United States Court of Appeals for the Second Circuit

APPENDIX

77-7060

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FILED
APR 15 1977
DANIEL FUSARO, CLERK
SECOND CIRCUIT

HOWARD M. LASKER and IRVING GOLDBERG,

Plaintiffs-Appellants,

—against—

HARRY G. BURKS, JR., EDWARD B. BURR, THOMAS F. CHALKER, JOHN R. HAIRE, HARVEY C. HOPKINS, S. P. HUTCHISON, DONALD L. KEMMERER, A. S. MIKE MONRONEY, CHARLES F. PHILLIPS, JEPTHA H. WADE, ANCHOR CORPORATION and FUNDAMENTAL INVESTORS, INC.,

Defendants-Appellees.

B P 5

ON APPEAL FROM ORDERS AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX

(Volume I—pages 1a-375a)

ARANOW BRODSKY BOHLINGER
BENETAR & EINHORN
Attorneys for Plaintiffs-Appellants
469 Fifth Avenue
New York, New York 10017
(212) 889-1470

DEWEY, BALLANTINE, BUSHBY,
PALMER & WOOD
Attorneys for Defendants-Appellees
Burks, Hopkins, Kemmerer,
Monroney, Phillips and Wade
140 Broadway
New York, New York 10005
(212) 344-8000

SEWARD & KISSEL
Attorneys for Defendant-Appellee
Fundamental Investors, Inc.
63 Wall Street
New York, New York 10005
(212) 248-2800

POLLACK & KAMINSKY
Attorneys for Defendants-Appellees
Anchor Corporation, Burr, Chalker,
Haire and Hutchison
61 Broadway
New York, New York 10006
(212) 952-0330

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UNITED STATES DISTRICT COURT

Jury demand date:
BY PLTFF. 2/5/73

D. C. Form No. 106 Rev.

73 CIV. 552

TITLE OF CASE

HOWARD M. LASKER & IRVING GOLDBERG
vs
HARRY G. BURKS, JR. ✓
EDWARD B. BURR ✓
THOMAS F. CHALKER ✓
JOHN R. HAIRE ✓
HARVEY C. HOPKINS ✓
S.P. HUTCHISON ✓
DONALD L. KEMMERER ✓
A.S. MIKE MONRONEY ✓
CHARLES F. PHILLIPS ✓
JEPTHA H. WADE ✓
ANCHOR CORP. ✓
FUNDAMENTAL INVESTORS, INC. ✓

ATTORNEYS

For plaintiff:
ARANOW, BRODSKY, BOHLINGER, BENETAR, EINHORN, DA
469 FIFTH AVE.
NEW YORK, N.Y. 10017
889-1470

For defendant: (Burks, Hopkins, Kemmerer Monroney, Phillips & Wade: Dewy, Ballantine Bushby, Palmer & Wood, 140 B'way, NYC. 10005

for deft. Fundamental Investors: Seward & Kissel
63 Wall St., NYC 10005

for Anchor Corp., Burr, Chalker, Haire & Hutchison: Pollack & ~~Singer~~ Kaminsky, 61 B'way,
NYC 10006

~~Dewey Ballentine Bushby Palmer & Wood~~
~~140 B'way, NYC 10005~~ (see above)

STATISTICAL RECORD	COSTS	
J.S. ~~5 mailed~~ X	Clerk	
J.S. 6 mailed ✓	Marshal	
Basis of Action: INVESTMENT CO. ACT 1940	Docket fee	
	Witness fees	
Action arose at:	Depositions	

DATE	NAME OR RECEIPT NO.	REC.		DISB.	
2/5/73	Brown B	N	—		
2/6/73			—	N	—

HOWARD M. [illegible]

PAGE 2 JUDGE WERKER 73 CIV. 55

DATE	PROCEEDINGS	Date Order or Judgment Note
Feb 5-73	Filed complaint and issued summons.	
Mar 7-73	Filed stip & order that the time for the deft. S.P. Hutchison to answer the complaint is extended to 4/15/73. So Ordered Gurfein J.	
Apr.23,73	Filed Stip & Order extending defts time to answer (S.P.Hutchison, John R. Haire, Edward Bb Burrand Anchor Corp.) from 4/15/73 to 5/22/73. Gurfein, J.	
May 17,73	Filed Pltff's Interrogs.	
May 22,73	Filed Stip & Order extending time for Deft. Fundamental Investors, Inc. to answer complaint from 5/22/73 to 6/22/73. Gurfein, J.	
May 23-73	Filed stipulation and order extending defts. Burks, Hopkins, Kemmerer, Monroney, Phillips, and Wade's time to answer complaint to 6/22/73. So ordered. Gurfein, J.	
May 21,73	Filed summons with marshals ret. served E.Burr, 3-29-73 by mail T.Chalker 3-12-73, J.Haire 2-26-73, Hopkins 2-15-73, N. Trimble 2-9-73, D.Kemmerer 4-5-73, M.Monroney 2-21-73, C.Phillips 2-12-73, R.Grant 2-20-73, J.Dealy 3-5-73, J.Dealy 3-5-73, and 3 not served.	
May 31,73	Filed Pltffs Interrogs to Defts.	
Jun 11,73	Filed Stip & Order extending time for defts S.P.Hutchison, John R.Haire, Edward B. Burf, Anchor Corp and Thomas F.Chalker to answer from 5/22/73 to 6/22/73. Gurfein, J.	
Jun26-73	Filed defts Burks, Hopkins, Kemmerer, Monroney, Phillips and Wade's notice pf motion for a stay of proceedings and supporting affdvts. ret:7-19-	
Jun26-73	Filed defts Burks, Hopkins Kemmerer, Monroney, Phillipsand Wade's memorandum in support of motion for stay of proceedings.	
Jun26-73	Filed defts Anchor Corp, Burr, Chalker, Haire and Hutchinsons' affdvt in suppo of motion to stay all proceedings.	
Jun26-73	Filed deft Fundamental Investors, Inc.s' affdvt in support of defts' motion staay all proceedings.	
Jul 2-73	Filed defts. (Burks, Hopkins, Kemmerer, Monroney, Phillips and Wade) objections to pltff's interrogs.	
Jul 3-73	Filed deft's (Anchor Corp) responds to interrogs.	
Jul 3-73	Filed defts' (Haire, Burr, Hutchison & Chalker) responds to interrogs.	
7-16-73	Filed pltfs. affdt. in oppos. to defts. motion for a stay of action, etc,.	
7-16-73	Filed pltfs. memorandum of law in oppos. to defts. motion for a stay.	
7-3-73	Filed stip. and order that the time for all defts. to ans. the complaint is ext .until the 10th day after the determination of the defts. pending motion for a stay of proceedings. So ordered, Gurfein, J.	
Sep.28,73	Filed Waiver the statute of limitations as a defense. (for deft) John R. Haire	
Sep.28,73	Filed Waiver the statute of limitations as a defense(for S.P.Hutchison	
Sep.28,73	Filed Waiver the statute of limitations as a defense(for Edward B. Burr.	
Sep.28,73	Filed Waiver the statute of limitations as a defense(for John R. Haire.	
Sep.28,73	Filed Waiver for Harry Burks to recover damages for losses incurred	
Oct.2-73	Filed pltfs. notice to take deposition of defts. whose addresses are Westminster at Parker, Elizabeth, New Jersey -- Anchor Corp. on Oct. 15,1973 Edward B. Burr on Oct. 17-73 John R. Hire on Oct. 19-73 Fundamental Investors, Inc. on Oct. 23-1973	
Oct.11-73	Filed Pltffs. Supplemental Affidavit in Opposition to Motion for a stay.	
Oct.9-73	Filed Waiver the statute of limitations as a defense(Fundatmental Investors	
Oct.9-73	FiledWaiverthe statute of limitations as a defensefor losses(Fundamental).	
Jul-31-73	Filed MEMORANDUM that the Court will not entertain the motion by defts to stay the proceedings until there is filed in this Court a formal waiver in writing of the statute of limitations by Anchor and by the other defts' in this action. If any party should seek to reargue this determination, opportunity will be given for oral argument in Sep. 1973 -- Gurfein, J. (received this memorandum on 11-12-73)	

Howard M. Lasker etano. vs.
Harry G. Burks,Jr. etal.

3A" JUDGE WERKER

D. C. 110A Rev. Civil Docket Continuation 73 Civ 552 page 3 Judge Gurfein

DATE	PROCEEDINGS	Date Judgn
Jul-31-73	Filed reply memorandum by defts in support for a stay.	
Jul-31-73	Filed memorandum pltff's memorandum in opposition to motion for a stay.	
Jul-31-73	Filed deft's reply memorandum in support of motion for a stay.	
Nov-12-73	Filed ORDER that the motion of defendants is hereby granted and ordered, that all further actions are stayed until twenty days following the trial or other determination of the claims asserted by Fundamental Investors, Inc. against Goldman, Sachs & Co. in the action entitled: Welch Foods, Inc., etal. v. Goldman, Sachs & Co., 70 Civ 4811 (the Welch action), or until further order of this Court; ordered that this order is granted without prejudice to an application by plaintiffs to vacate the same should it appear that the claims asserted by Fundamental Investors, Inc. against Goldman, Sachs & Co. in the Welch action are not being prosecuted with reasonable diligence. -- Gurfein, J. (m/n)	
3-7-74	Filed order that this action be transferred to the suspense docket of the Court subject to reinstatement on the calender of Judge Gurfein upon the filing of a stipulation by the parties to the effect that they are prepared to actively litigate this cause. - Gurfein, J. m/n	
Aug- 2-74	Filed stip. and order that the time of defendants to answer is ext. to 9-5-74 (re defendants Burks, Hopkins, Kemmerer, Monroney, Phillips and Wade)	
Sep.12-74	Filed Stipulation and order extending time of defts. to answer to the complaint to 10/10/74 - So ordered - GURFEIN,J.	
Sep.16-74	Filed Stipulation and order that action previously been transferred to suspense calendar may be restored to the active calendar. So ordered - WERKER,J.	
Oct.17-74	Filed Stipulation and order extending time to answer complaint to 11/11/74 - WERKER,J.	
Nov-20-74	Filed stip. and order ext. defendants time to answer to 1-14-74 -- Werker, J.	
01-20-75	Filed stip. and order ext. defts' time to answer to 1-28-75 -- Werker, J.	
02-03-75	Filed deft. Fundamental Investors, Inc.'s affdvt. and notice of motion to dismiss under Rule 12(b) - ret. 2-20-75	
02-03-75	Filed deft. Fundamental Investors, Inc.'s memorandum in support of above motion.	
03-31-75	Filed pltf's memorandum of law in opposition to defts' motion to dismiss.	
4-03-75	Filed stip. and order that the time of defendants to file reply papers on pending motion is ext. to 4-25-75 -- Werker, J.	
04-28-75	Filed stip. and order ext. defts time to file reply papers to the pending motion to dismiss to 5-2-75 -- Werker, J. (HRW)	
09-26-75	Filed documents referred to in plaintiffs' memorandum of law in opposition to defendants' motion to dismiss.	
09-26-75	Filed defendants' reply memorandum in support of motion to dismiss.	
09-26-75	Filed supplemental affdvt. in support of motion to dismiss.	
09-26-75	Filed OPINION #43128..that the motion under Rule 12(b) by THE FUND, joined by all defendants is denied without prejudice to renew the same upon the completion of discovery. -- So ordered -Werker, J. m/n	
09-26-75	Filed stip. and order (dated 5-1-75) that the time of defendants to file reply papers on the pending motion to dismiss complaint is ext. to 5-9-75 -- Werker, J.	
10-14-75	Filed memorandum in support of plaintiffs' motion for reargument.	
10-14-75	Filed pltf's affdvt. and notice of motion for reargument of Court's opinion #43128 - ret. 10-27-75.	

73 Ci. [illegible]

DATE	PROCEEDINGS	Date Of Judgment
10-21-75	Filed AMENDMENT TO OPINION #43128 on pages 11, 14, 15 and 16 as indicated herein. So ordered. -- Werker, J. (attached to Original Opinion #43128) m/n	
11-07-75	Filed stip. and order ext. defts time to file answering papers to pending motion to 11-10-75; the 90 days granted to pltf to conduct discovery as set forth in memorandum-decision of 9-26-72, shall, if applicable, run from the date of the determination by this court of the motion for reargument. -- Werker, J.	
11-12-75	Filed defendants' reply memorandum in opposition to reargument.	
01-05-76	Filed notice of name change of Attorney for deft. Anchor Corp.	
01-07-76	Filed Order that plaintiffs' motion for reargument based on Judge Gagliardi's decision on Boyko v. The Reserve Fund, Inc., is denied. Werker, J. m/n	
02-23-76	Filed amendment to memorandum decision and order #43128 - correcting pages 3, line 18 and page 13, line 11 as indicated herein/ So ordered.- Werker, J. m/n	
05-28-76	P.T.C. held - HFW	
7-30-76	Filed defts. (as indicated) memorandm of law in support of renewed' motion to dismiss.	
7-30-76	Filed deft. Fundamental Investors affdt. of Roger Wickers in support of renewed motion to dismiss.	
09-02-76	Filed stip. and order ext. pltfs time to submit answering papers with respect to the pending motion to dismiss to 9-20-76; deft's reply papers to be filed by 10-31-76 -- Werker, J. HFW	
09-20-76	Filed deposition of Louis Frederick Laun dtd. 4-6-76	
09-20-76	Filed deposition of Wilhelm J. Stephens dtd. 2-26-76	
09-20-76	Filed deposition of Mary S. O'Connor dtd. 3-9-76	
09-20-76	Filed deposition of John R. Haire dtd. 2-10-76	
09-20-76	Filed deposition of Beryl Robichaud dtd. 3-9-76	
09-20-76	Filed deposition of Leon T. Kendall dtd. 2-26-76	
09-20-76	Filed continued deposition of Leon T. Kendall dtd. 3-24-76	
09-20-76	Filed plaintiffs' deposition exhibits (re depositions of Haire, Kendall, O'Connor, Stephens, Robichaud and Laun) m/n	
09-23-76	Filed affdvt. of James C. Sargent on behalf of plaintiff.	
09-23-76	Filed pltfs memorandum of law in opposition to deft's motion to dismiss.	
11-08-76	Filed stip. and order that the time of defendants to file their reply papers is ext. to 11-15-76. -- Werker, J.	
11-11-76	Filed defts. reply memorandum in support of renewed motion to dismiss. (deft. Fundamental Investor, Inc.)	
11-11-76	Filed deft. Fundamental Investor, Inc. reply affdt. of Roger Wickers in support of renewed motion to dismiss.	
01-12-77	Filed OPINION #45516...Summary judgment is granted to the defendants-- Werker, J. m/m	
01-17-77	Filed JUDGMENT AND ORDER that defendants have judgment against the plaintiffs dismissing the complaint. -- Clerk. m/n	

CIVIL DOCKET CONTINUATION SHEET

PLAINTIFF	DEFENDANT	
Howard M. Lasky et.ano.	Harry G. Burks, Jr. et.al.	DOCKET NO. 73-0552 PAGE 5 OF ____ PAGES

DATE	NR.	PROCEEDINGS
01-27-77	--	Filed pltfs notice of appeal to the USCA for the 2nd Circuit from final judgment dismissing action and from prior rulings that produced final judgment. - copies mailed
*6-27-73		Filed Marshal's return on summons and complaint on David N. Meyer, Esq.
3-2-77		Filed letter dated July 17-73, from Leonard Joseph to Anthony L. Tersigni.
3-2-77		Filed letter dated July 18-73, from Anthony L. Tersigni to Judge Gurfein.
3-2-77		Filed letter dated October 19-73, from Thomas F. Chalker to Daniel A. Pollack.
3-2-77		Filed Waiver of Defendant Wade.
3-2-77		Filed letter dated October 5-73, from Anthony L. Tersigni to Judge Gurfein.
3-2-77		Filed letter dated October 5-73, from Daniel A Pollack to Judge Gurfein.
3-2-77		Filed letter dated October 10-73, from Anthony L. Tersigni to Judge Gurfein.
3-2-77		Filed letter dated October 10-73, from Eugene P. Souther to Judge Gurfein.
3-2-77		Filed letter dated October 12-73, from Leonard Joseph to Judge Gurfein.
3-2-77		Filed letter dated October 23-73, from Leonard Joseph to Judge Gurfein.
3-2-77		Filed letter dated November 6-73, from Anthony L. Tersigni to Judge Gurfein.
3-2-77		Filed letter dated November 8-73, from Daniel A. Pollack to Judge Gurfein.
*2-26-75		Filed stipulation and order for extension of time to serve answering papers to defendants motion to dismiss the complaint from March 27-75 to Apr. 10-75.
3-4-77		Filed notice that the original record has been transmitted to the USCA

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

--x

HOWARD M. LASKER
and IRVING GOLDBERG,

Plaintiffs,

-against-

HARRY G. BURKS, JR., EDWARD B. BURR,
THOMAS F. CHALKER, JOHN R. HAIRE,
HARVEY C. HOPKINS, S. P. HUTCHISON,
DONALD L. KEMMERER, A. S. MIKE MONRONEY,
CHARLES F. PHILLIPS, JEPTHA H. WADE,
ANCHOR CORPORATION, and FUNDAMENTAL
INVESTORS, INC.,

Defendants.

--x

73 Civ.

COMPLAINT

PLAINTIFFS DEMAND
TRIAL BY JURY

Plaintiffs allege on information and belief, except as to Paragraphs 2 and 6, which are alleged upon knowledge by each of said plaintiffs:

1. The jurisdiction of this Court over this action is based upon Section 44 of the Investment Company Act of 1940 (15 U.S.C. §80a-43), Section 214 of the Investment Advisers Act of 1940 (15 U.S.C. §80b-14) and principles of pendent jurisdiction.

2. Plaintiff Howard M. Lasker is, and at the time of the transactions complained of was, the beneficial owner of shares of Fundamental Investors, Inc. (the "Fund"). Plaintiff Irving Goldberg is, and at the time of the transactions complained of was, the record owner of shares of the Fund. Plaintiffs bring this action derivatively on behalf and in the right of the Fund.

3. The Fund is, and at the time of the transactions complained of was, a corporation organized under the laws of the State of Delaware and a registered investment company under the Investment Company Act of 1940.

4. Defendant Anchor Corporation (the "Adviser") is, and at the time of the transactions complained of was, a corporation organized under the laws of the State of Delaware and a registered investment adviser under the Investment Advisers Act of 1940.

5. Defendants Harry G. Burks, Jr., Edward B. Burr, Thomas F. Chalker, John R. Haire, Harvey C. Hopkins, S. P. Hutchison, Donald L. Kemmerer, A. S. Mike Monroney, Charles F. Phillips and Jeptha H. Wade (the "Fund directors") were directors of the Fund at all times mentioned.

6. This action is not brought collusively to confer upon this Court jurisdiction which it otherwise would not have and plaintiffs will fairly and adequately represent the interests of the Fund and its stockholders in enforcing the Fund's rights.

7. (a) No demand has been made by the plaintiffs upon the Board of Directors of the Fund to institute this action against the individual defendants and the Adviser because the Fund's Board of Directors is dominated and controlled by the Adviser and the individual defendants continue to be a majority of the Fund's Board of Directors and they have participated, cooperated and aided and abetted in the wrongful acts, transactions and delinquencies complained of. No action could or would be permitted to be instituted by the Fund without the consent of the Fund directors. The Fund's Board of Directors for a considerable time has been fully aware of the wrongful acts herein alleged and has nevertheless failed to take action. Consequently, any demand upon the Fund's Board of Directors

would be futile and useless and any such action that would be instituted by the Board of Directors on behalf of the Fund would be friendly to the defendants, would not be diligently prosecuted and would be hostile to the interests of the Fund and its stockholders.

(b) No demand has been made upon the stockholders of the Fund to institute this action on behalf of the Fund because under applicable law and the certificate of incorporation and by-laws of the Fund, its directors and officers are vested with the management of the Fund, including the institution of all actions on behalf of the Fund, and the stockholders as a body cannot by resolution compel the directors to institute suit on behalf of the Fund. A resolution by the stockholders of the Fund directing the institution of this action would be futile and useless because the prosecution of the action would be placed in the control of the Fund's Board of Directors, the majority of whom are defendants and who had knowledge of and participated, cooperated and aided and abetted in the wrongs alleged herein. Furthermore, the stockholders of the Fund are very numerous and the solicitation of proxies from such a large number of stockholders would place an unreasonable and useless burden and expense on plaintiffs, and extended delays would result which would be harmful and seriously prejudicial to the prosecution of this action.

FIRST CLAIM FOR RELIEF

8. Plaintiffs repeat and reallege Paragraphs 1 through 7 of the Complaint.

9. This claim arises under Section 36 of the Investment Company Act of 1940.

10. On the following dates and in the amounts indicated, the Fund purchased interest bearing commercial paper of Penn Central Transportation Company ("Penn Central") in the Southern District of New York from Goldman, Sachs & Co. ("Goldman, Sachs"), which acted as principal, by use of the mails and the means and instrumentalities of interstate commerce:

Date of Purchase	Amount of Purchase
November 28, 1969	$5,000,000
December 2, 1969	5,000,000
December 4, 1969	5,000,000
December 8, 1969	5,000,000
	$20,000,000

11. At all relevant times the Fund directors were responsible for determining the basic investment policies of the Fund and the Adviser acted as investment adviser to the Fund and was responsible for making recommendations to the Fund with respect to purchase and sale of all investments, including commercial paper. During 1969 the Adviser received, pursuant to its investment advisory contract, in excess of $4,500,000 from the Fund for investment supervisory and corporate administrative services and in excess of $300,000 in net sales commissions as principal underwriter of the Fund's shares.

12. In making the purchases alleged in Paragraph 10, the Fund directors and the Adviser relied solely and exclusively

on Goldman, Sachs and made no independent investigation of the financial condition of Penn Central or the quality of its commercial paper including, where feasible, among other things, the following: examination and analysis of quarterly or more frequent financial statements; calculation of debt-equity ratios; obtaining of lists of open bank lines of credit and inquiry as to whether any such were used; calculation of the ratio of current assets to current liabilities; examination and analysis of debt position to check for defaults; review of the appropriate Docket of the Interstate Commerce Commission with respect to the proposed issuance of commercial paper by Penn Central; verifying creditworthiness of issuer with custodian bank; inquiry with respect to maximum amount of bank lines of credit ever used; examination of percentage of commercial paper outstanding backed by usable lines of credit; obtaining cash flow statement, if available. In failing to make the foregoing investigation, the Adviser failed to meet its responsibility as the Fund's investment adviser, for which investment management and advice it received the very substantial compensation set forth in Paragraph 11. The Fund directors knew or should have known of, and acquiesced in, the failure by the Adviser to meet its responsibility and failed to meet their responsibilities as members of the Fund's Board of Directors.

13. If the Fund directors and the Adviser had made an independent investigation of the financial condition of Penn Central and the quality of its commercial paper in connection with the Fund's purchase of Penn Central commerical paper (including a review of material available in the public press),

they would have learned at least the following material adverse facts:

(a) The commercial paper of Penn Central was not prime quality commercial paper;

(b) Goldman, Sachs had made inadequate independent investigation of the financial condition and affairs of Penn Central and was not continually reviewing the same to ascertain whether Penn Central commercial paper was of prime quality or to evaluate the advisability of purchases of said commercial paper by the Fund;

(c) Penn Central had for some time been facing severe cash shortages and difficulties in obtaining financing to meet its operating expenses, improvement costs and debt maturities;

(d) Penn Central had for some time been unable to obtain long-term financing and had, since at least as early as 1968, become almost completely dependent upon short-term, high interest financing, had been required to maintain substantial compensating balances at its lending banks and had no present prospects for obtaining long-term financing;

(e) Penn Central had virtually exhausted all possibilities to obtain bank loans, had already pledged virtually all of its assets to its bank creditors and had no assets to pledge or otherwise use to obtain further loans or financing or to cover or meet its commercial paper obligations;

(f) Penn Central was using the funds which it obtained from the sales of its commercial paper to refinance its debt maturities rather than for its current operating expenses;

(g) Penn Central was undergoing extraordinarily large and rapidly increasing operating losses and working capital deficits;

(h) During 1970 Penn Central would have to have available far in excess of $200,000,000 merely to meet debt maturities and interest costs and would have to raise other substantial and unavailable sums to meet its other anticipated expenses;

(i) In an application by Penn Central to the Interstate Commerce Commission for approval to issue commercial paper, the Interstate Commerce Commission and its staff had expressed serious concern over the heavy dependence of Penn Central upon short-term financing;

(j) Penn Central had no firm commitments by commercial banks to assure that it would have sufficient funds to redeem its outstanding commercial paper at maturity, and did not have bank lines of credit sufficient for that purpose;

(k) Most banks were at or near their legal or practical lending limits with respect to Penn Central and were looking to reductions of their loans rather than increases and it was highly doubtful that Penn Central could obtain authorization from the Interstate Commerce Commission to issue additional commercial paper beyond the $200,000,000 then authorized;

(l) In November 1969 Penn Central reported a loss of approximately $40,200,000 for the first nine months of 1969 as compared to a loss of approximately $13,800,000 for the comparable period in 1968;

(m) On or about November 29, 1969, the Board of Directors of Penn Central's parent company omitted that corporation's regular fourth quarter dividend.

14. On June 21, 1970 Penn Central filed a petition for reorganization under Section 77 of the Bankruptcy Act (11 U.S.C. §205).

15. The Penn Central commercial paper held by the Fund was not paid at maturity and is presently in default and the Fund has not received any payment with respect to such commercial paper up to the date of this Complaint, thereby resulting in a loss to the Fund of $20,000,000 plus accrued interest.

16. By reason of the foregoing, defendants, in contravention of Section 36 of the Investment Company Act of 1940, engaged in acts and practices constituting gross misconduct and a gross abuse of trust in respect of the Fund.

SECOND CLAIM FOR RELIEF

17. Plaintiffs repeat and reallege Paragraphs 1 through 7 and Paragraphs 10 through 15 of the Complaint.

18. This claim arises under Section 206 of the Investment Advisers Act of 1940.

19. By reason of the foregoing, the Adviser, in contravention of Section 206 of the Investment Advisers Act of 1940, by use of the mails and the means and instrumentalities of interstate commerce, engaged in transactions, practices and a course of conduct which operated as a fraud and deceit upon the Fund and engaged in acts, practices and a course of conduct which were fraudulent.

THIRD CLAIM FOR RELIEF

20. Plaintiffs repeat and reallege Paragraphs 1 through 7 and Paragraphs 10 through 15 of the Complaint.

21. By reason of the foregoing, the defendants violated their common law fiduciary duty to the Fund and are jointly and severally liable and accountable to the Fund for all loss and damage which it has suffered and will suffer by reason of the acts, transactions and delinquencies complained of.

FOURTH CLAIM FOR RELIEF

22. Plaintiffs repeat and reallege Paragraphs 1 through 7 and Paragraphs 10 through 15 of the Complaint.

23. By reason of the foregoing, the Adviser breached its investment advisory contract with the Fund and the Fund directors participated and aided and abetted in the breach of said investment advisory contract in that the Adviser failed to make an independent investigation of the financial condition of Penn Central and the quality and safety of its commercial paper and the Fund directors acquiesced in such failure, thereby damaging the Fund as alleged, and the defendants are jointly and severally liable and accountable to the Fund for all loss and damage which it has suffered and will suffer by reason of the breach of the investment advisory contract complained of.

FIFTH CLAIM FOR RELIEF

24. Plaintiffs repeat and reallege Paragraphs 1 through 7 and Paragraphs 10 through 15 of the Complaint.

25. This claim arises under Section 36 of the Investment Company Act of 1940.

26. From November 28, 1969 to June 21, 1970, the date of the filing of a petition for the reorganization of Penn Central under Section 77 of the Bankruptcy Act, the financial condition of Penn Central worsened steadily and Penn Central commercial paper became an increasingly poor investment.

27. During the period from November 28, 1969 to June 21, 1970, the Adviser and the Fund directors failed to commence a thorough and adequate investigation of, and keep under continuous review, the financial condition of Penn Central and the quality and safety of its commercial paper.

28. If such investigation and review had been made (including a review of material available in the public press), the Adviser and the Fund directors would have learned at least the material adverse facts, among others, set forth at subparagraphs (a)-(m), inclusive, of Paragraph 13 of this Complaint as well as at least the following material adverse facts:

(a) Penn Central's losses for 1969 had increased to approximately $56,300,000 from approximately $5,100,000 for 1968;

(b) The losses of Penn Central for the first quarter of 1970 were approximately $62,700,000;

(c) On or about February 12, 1970, Penn Central repurchased at face value $10,000,000 of its commercial paper from Goldman, Sachs;

(d) Penn Central had virtually exhausted its ability to obtain short term financing in the United States;

(e) Penn Central and its parent company had begun to borrow heavily at high interest rates in Europe from borrowers who were relatively unsophisticated about Penn Central;

(f) On or about April 22, 1970, there commenced a rapid run on Penn Central commercial paper and it became virtually impossible for Goldman, Sachs to resell Penn Central commercial paper as it became due;

(g) On or about May 9, 1970, high Penn Central officials met with the Secretary of the Treasury with respect to emergency Government assistance for the failing railroad;

(h) On or about May 15, 1970 Standard and Poor's reduced the credit rating of Penn Central's parent company from BBB to BB.

29. During the period from November 28, 1969 to June 21, 1970, the Fund directors failed in their obligations to make adequate attempts to resell (as did Goldman, Sachs as referred to in subparagraph (c) of Paragraph 28) the Penn Central commercial paper held by the Fund and the Adviser failed to advise the Fund of the advisability of making such attempts.

30. During the period from November 28, 1969 through June 21, 1970, the Adviser, pursuant to its investment advisory contract, continued to be compensated by the Fund for investment supervisory and corporate administrative services at an annual rate in excess of $4,500,000 and continued to receive net sales commissions as principal underwriter of the Fund's shares at an annual rate in excess of $300,000.

31. By reason of the foregoing, defendants, in contravention of Section 36 of the Investment Company Act of 1940, engaged in acts and practices constituting gross misconduct and a gross abuse of trust in respect of the Fund.

SIXTH CLAIM FOR RELIEF

32. Plaintiffs repeat and reallege Paragraphs 1 through 7, Paragraphs 10 through 15 and Paragraphs 26 through 30 of the Complaint.

33. This claim arises under Section 206 of the Investment Advisers Act of 1940.

34. By reason of the foregoing, the Adviser, in contravention of Section 206 of the Investment Advisers Act of 1940, by the use of the mails and the means and instrumentalities of interstate commerce, engaged in transactions, practices and a course of conduct which operated as a fraud and deceit upon the Fund and engaged in acts, practices and a course of conduct which were fraudulent.

SEVENTH CLAIM FOR RELIEF

35. Plaintiffs repeat and reallege Paragraphs 1 through 7, Paragraphs 10 through 15 and Paragraphs 26 through 30 of the Complaint.

36. By reason of the foregoing, the defendants violated their common law fiduciary duty to the Fund and are jointly and severally liable and accountable to the Fund for all loss and damage which it has suffered and will suffer by reason of the acts, transactions and delinquencies complained of.

EIGHTH CLAIM FOR RELIEF

37. Plaintiffs repeat and reallege Paragraphs 1 through 7, Paragraphs 10 through 15 and Paragraphs 26 through 30 of the Complaint.

38. By reason of the foregoing, the Adviser breached its investment advisory contract with the Fund and the Fund directors participated and aided and abetted in the breach of said investment advisory contract in that the Adviser failed to commence a thorough and adequate investigation of, and keep under continuous review, the financial condition of Penn Central and the quality and safety of its commercial paper and the Fund directors acquiesced in such failure, thereby damaging the Fund as alleged, and the defendants are jointly and severally liable and accountable to the Fund for all loss and damage which it has suffered and will suffer by reason of the breach of the investment advisory contract complained of.

NINTH CLAIM FOR RELIEF

39. Plaintiffs repeat and reallege Paragraphs 1 through 17, Paragraphs 10 through 15 and Paragraphs 26 through 30 of the Complaint.

40. This claim arises under Section 13(a)(3) of the Investment Company Act of 1940.

41. The Fund's registration statement filed with the Securities and Exchange Commission pursuant to Section 8(b) of the Investment Company Act of 1940 states, as a fundamental policy, that the Fund may not hold more than 10% of the securities (voting and non-voting) of any one issuer.

42. During the period from November 28, 1969 to June 21, 1970, the date of the filing of a petition for reorganization of Penn Central under Section 77 of the Bankruptcy Act, the outstanding commercial paper of Penn Central dropped from $200,000,000 to approximately $82,000,000.

43. The $20,000,000 of Penn Central commercial paper held by the Fund constituted the holding of more than 10% of the securities of a single issuer.

44. The Fund directors and the Adviser failed in their responsibility to ascertain that the Fund's holding of Penn Central commercial paper deviated from the fundamental policy set forth in the Fund's registration statement filed with the Securities and Exchange Commission pursuant to Section 8(b)(2) of the Investment Company Act of 1940.

45. By reason of the foregoing, the defendants, in contravention of Section 13(a)(3) of the Investment Company Act of 1940, caused the Fund to deviate from the fundamental policy recited in its registration statement filed with the Securities and Exchange Commission pursuant to Section 8(b)(2) of the Investment Company Act of 1940.

WHEREFORE, plaintiffs demand judgment against the defendants as follows:

(a) That the Fund directors and the Adviser be required to account to the Fund for all loss and damage sustained and to be sustained by the Fund as a result of the wrongful acts, transactions and delinquencies complained of.

(b) That plaintiffs recover the costs and disbursements of this action including reasonable fees to plaintiffs' attorneys and accountants.

(c) That plaintiffs have such other and further relief as may be just and proper.

ARANOW, BRODSKY, BOHLINGER,
BENETAR, EINHORN & DANN

By
(A Member of the Firm)
Attorneys for Plaintiffs
Office & P.O. Address
469 Fifth Avenue
New York, New York 10017
(212) 889-1470

STATE OF NEW YORK)
: s.s.
COUNTY OF NEW YORK)

HOWARD M. LASKER, being duly sworn, deposes and says that he is a plaintiff in the within action; that he has read the foregoing Complaint and knows the contents thereof; that the same are true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes them to be true.

Howard M Lasker
Howard M. Lasker

Sworn to before me this
29th day of January, 1973.

David J Sweet
Notary Public

DAVID J. SWEET
Notary Public, State of New York
No. 31-3915600
Qualified in New York County
Term Expires March 30, 1973

STATE OF NEW YORK)
: s.s.
COUNTY OF Kings)

IRVING GOLDBERG, being duly sworn, deposes and says that he is a plaintiff in the within action; that he has read the foregoing Complaint and knows the contents thereof; that the same are true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes them to be true.

Irving Goldberg
Irving Goldberg

Sworn to before me this
1 day of FeB , 1973.

Ralph M Warren
Notary Public

RALPH M. WARREN
Notary Public, State of New York
No. 24-4181033, Qual. in Kings County
Cert. filed in Kings County
Commission Expires March 30, 1973

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x
HOWARD M. LASKER, et al., :
Plaintiffs, :
-against- :
HARRY G. BURKS, JR., et al., :
Defendants. :
- x

73 Civ. 552 M.I.G.

AFFIDAVIT IN SUPPORT OF MOTION FOR A STAY OF PROCEEDINGS

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

LEONARD JOSEPH, being duly sworn, deposes and says:

1. I am admitted to practice before this Court and am a member of the firm of Dewey, Ballantine, Bushby, Palmer & Wood, attorneys for defendants Burks, Hopkins, Kemmerer, Monroney, Phillips and Wade, who were outside directors of defendant Fundamental Investments, Inc. (the "Fund") and constituted a majority of its board of directors during the times relevant to this action. I make this affidavit in support of defendants' motion for a stay of proceedings.

2. This is a derivative action brought by two alleged shareholders of the Fund to recover for losses the Fund suffered by reason of its purchase of commercial paper of Penn Central Transportation Co. from Goldman, Sachs & Co. in late November and early December, 1969. A copy of the complaint is annexed to and made a part of this affidavit as Exhibit A.

3. The Fund commenced a suit in its own name in November, 1970, against Goldman, Sachs & Co., seeking to recover for the same loss. That suit, in which the Fund is one of four plaintiffs, is entitled Welch Foods, Inc., et al. v. Goldman,

Sachs & Co., 70 Civ. 4811 (the "Goldman, Sachs suit"), and is expected to be tried in this Court in the fall of this year. A copy of the complaint in the Goldman, Sachs suit is annexed to and made a part of this affidavit as Exhibit B.

4. By this motion all defendants seek a stay of proceedings in the present suit pending the forthcoming trial and determination of the Goldman, Sachs suit. Since a favorable result in the Goldman, Sachs suit would make further action on behalf of the Fund unnecessary, a stay would serve the interest of judicial economy and avoid substantial effort and expense for the parties which may be wasteful and unnecessary.

The Goldman, Sachs Suit

5. The Fund, a diversified open-end management investment company, purchased $20,000,000 of the commercial paper of Penn Central Transportation Co. ("Penn Central") between the dates of November 28 and December 8, 1969. The purchases were made from Goldman, Sachs & Co., the exclusive dealer for the commercial paper.

6. In June 1970, Penn Central filed a petition for reorganization under the Bankruptcy Act, and the commercial paper was not paid on maturity.

7. As shown in the affidavit of Charles F. Phillips submitted in support of this motion, at a regularly scheduled board meeting of the Fund on October 28, 1970, special counsel to the Fund reported to the board of directors and gave his advice with respect to the Fund's rights in connection with its purchase of Penn Central commercial paper.

8. As further stated in that affidavit, the board of directors considered that advice and decided that the Fund should

commence the Goldman, Sachs suit and defer a decision whether to sue others, including the Fund's investment adviser, Anchor Corporation ("Anchor") and its personnel, until after the determination of the Goldman, Sachs suit.

9. Mr. Phillips' affidavit states that this decision by the directors was based on the following considerations:

> (a) If the Goldman, Sachs suit were successful, no further action by the Fund would be necessary;
>
> (b) Anchor agreed not to assert the statute of limitations in any suit the board of directors might authorize against it in connection with the purchases;
>
> (c) Another suit in addition to the Goldman, Sachs suit would be unnecessarily duplicative and would be burdensome in terms of litigation expense and additional loss of executives' time, and also in terms of the Fund's duty to indemnify the legal expenses of Fund directors who might be defendants, should they be successful in such a suit;
>
> (d) Anchor and its personnel were needed in the prosecution of the Goldman, Sachs suit, and would better serve the Fund's interests if they were not defending a suit by the Fund against them;
>
> (e) Any suit against Anchor or its personnel might be detrimental to the Fund's business relationships with them.

10. As stated in the affidavit of Roger T. Wickers, the Fund's Secretary, the Goldman, Sachs suit was vigorously prosecuted by the Fund and discovery ended on June 1, 1973. I am informed that the Court has advised the attorneys in that suit that it expects to conduct the trial this fall.

The Present Derivative Suit

11. This action was commenced by the filing of the complaint on February 5, 1973, more than two years after the Fund sued Goldman, Sachs, and three years after the events complained of. Service on the defendants began thereafter, and my firm was

retained by the outside directors on May 17, 1973. I am informed that the last of our clients was served May 22, 1973.

12. The principal relief sought in this suit is an accounting for damage sustained "and to be sustained" by the Fund by reason of the purchases of Penn Central commercial paper, and is the same relief that the Fund seeks in the Goldman, Sachs suit.

Reasons Supporting a Stay

13. A successful resolution of the Fund's action against Goldman, Sachs, which is expected to be tried this fall, would make this case academic, since the Fund there seeks recovery of its entire loss resulting from its purchase of Penn Central commercial paper.

14. Further proceedings in this suit in tandem with the Goldman, Sachs suit will cause burdens and expense for all defendants, including the Fund, which may prove to be unnecessary and wasteful, and will require the Fund's management personnel to divert extra time from the Fund's affairs and from preparation and trial of the Goldman, Sachs suit. Interrogatories already served on defendants would require a substantial amount of time and effort by the Fund's officers and counsel.

15. If both actions proceed at this time, the Fund will incur further expense, which may be needless, by reason of its duty to indemnify those of its officers and directors who are defendants here for their legal expenses, should they be successful in this suit.

16. In contrast to these reasons for granting a stay of this action, no significant prejudice would appear to result for plaintiffs if a stay were granted. As indicated, a stay would be of limited duration in light of the fact that the Goldman, Sachs

suit is expected to be tried this fall. Since plaintiffs waited almost three years after the events complained of before instituting the present suit, this moderate additional delay would not seem inequitable, and would not prejudice any rights plaintiffs may have.

17. The Fund's board of directors made a good faith exercise of business judgment that the interests of the Fund would best be served by proceeding vigorously with the Goldman, Sachs suit in an effort to recover the Fund's losses in full, reserving the Fund's rights against others. The Fund has implemented that program, conducting full discovery, to the point that it is now ready to proceed with trial in the Goldman, Sachs suit. The two plaintiffs who instituted this action should not be permitted to substitute their wishes for the judgment of the duly constituted management as to how the Fund should assert its rights.

18. To avoid unnecessary expense to the Fund and the other defendants, and in the interests of judicial economy, the Court should stay proceedings in this action until after trial and decision in the Goldman, Sachs suit.

Leonard Joseph
Leonard Joseph

Sworn to before me
this 22nd day of June, 1973.

Notary Public

JOHN M. FRIEDMAN, JR.
NOTARY PUBLIC, State of New York
No. 31-1326551
Qualified in New York County
Commission Expires March 30, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

HOWARD M. LASKER, et al., :

Plaintiffs, :

-against- :

HARRY G. BURKS, JR., et al., :

Defendants. :

- x

73 Civ. 552 M.I.G.
AFFIDAVIT IN SUPPORT
OF MOTION FOR A STAY
OF PROCEEDINGS

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

CHARLES F. PHILLIPS, being duly sworn, deposes and says:

1. I am a defendant in this action and director of Fundamental Investors, Inc. (the "Fund"). I am not, and never have been, affiliated with the Fund's investment adviser, Anchor Corporation ("Anchor"), nor am I an "interested person" of the Fund within the meaning of the Investment Company Act of 1940. I make this affidavit in support of the defendants' motion for a stay of proceedings.

2. I have been a director of the Fund since 1967 and am familiar with the decisions of the Fund's directors made during my tenure.

3. Between November 28 and December 8, 1969, the Fund purchased $20,000,000 of the commercial paper of Penn Central Transportation Company. The Penn Central commercial paper was purchased from the exclusive dealer, Goldman, Sachs & Co.

4. In June 1970, Penn Central filed a petition under the Bankruptcy Act and its commercial paper held by the Fund was not paid on maturity.

5. On October 28, 1970, at a regularly scheduled Board Meeting which I attended, Special Counsel reported to us and advised us with respect to the Fund's rights in connection with its purchase of Penn Central commercial paper. The Board of Directors of the Fund considered the rights of the Fund, in light of counsel's advice, against Goldman, Sachs & Co. and others, including Anchor.

6. As a result of these deliberations, the Board of Directors of the Fund authorized the commencement of a suit against Goldman, Sachs & Co., which suit was commenced in November, 1970.

7. The Board of Directors of the Fund concluded, for a number of reasons, not to pursue an action against Anchor or its officers at that time but to defer such a decision until after the determination of the Fund's suit against Goldman, Sachs. These reasons included the following:

(a) If the Goldman, Sachs suit were successful, no further action by the Fund would be necessary;

(b) Anchor agreed not to assert the statute of limitations in any suit the Board of Directors might authorize against it in connection with the purchases;

(c) Another suit in addition to the Goldman, Sachs suit would be unnecessarily duplicative and would be expensive in terms of litigation expense and additional loss of executives' time and also in terms of the Fund's duty to indemnify any of the Fund's directors who might be defendants, should they be successful in such a suit;

(d) Anchor and its personnel were needed in the prosecution of the Goldman, Sachs suit, and would better serve the Fund's interests if they were not defending a suit against Anchor; and

(e) Any suit against Anchor or its personnel might be detrimental to the Fund's business relationships with them.

8. During this entire time, a majority of the Board of Directors of the Fund was made up of directors who were not affiliated with Anchor and were not "interested persons" of the Fund within the meaning of the Investment Company Act of 1940.

9. These reasons are equally compelling today, especially in light of the short time until trial in the Goldman, Sachs suit. Accordingly, I request that the Court stay this action until after the trial of the Goldman, Sachs suit, so that in light of the results of that suit the Board of Directors can then consider what further action, if any, would be appropriate and in the Fund's best interests, as it originally planned.

Charles F. Phillips

Sworn to before me this
19th day of June, 1973.

Notary Public

JOHN [illegible], JR.
NOTARY PUBLIC, State of New York
No. 31-1576551
Qualified in New York County
[illegible] Expires March 30, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- x

HOWARD M. LASKER, et al., :

Plaintiffs, :

-against- :

HARRY G. BURKS, JR., et al., :

Defendants. :
- x

73 Civ. 552 M.I.G.

AFFIDAVIT IN SUPPORT OF MOTION FOR A STAY OF PROCEEDINGS

STATE OF NEW JERSEY)
: ss.:
COUNTY OF UNION)

MARY S. O'CONNOR, being duly sworn, deposes and says:

1. I am a director and shareholder of Fundamental Investors, Inc. (the "Fund"), a defendant in this action, on whose behalf the action is brought. I am not affiliated with the Fund's investment adviser, and I am not an "interested person" of the Fund within the meaning of the Investment Company Act of 1940. I became a director by vote of the Fund's shareholders and assumed office on June 28, 1972. I make this affidavit in support of defendants' motion for a stay of proceedings.

2. I had no connection with the conduct alleged to have been wrongful in the complaint in this action; nor am I interested financially or otherwise in the outcome of this litigation apart from my duties as a present director and shareholder of the Fund.

3. As shown in the other papers submitted in support of this motion, the Fund decided nearly three years ago to pursue its possible claims for losses arising from its purchases of Penn Central Transportation Company commercial paper by first attempting to recover its losses in a lawsuit against Goldman, Sachs & Co., which sold the paper to the Fund. Following this, to the extent the Fund was not made whole, the Board of Directors of the Fund planned to make a determination whether any valid claims lay against others including its investment adviser, and, if so, whether as a matter of business judgment it would be in the Fund's best interest to pursue such claims.

4. This determination by the Board of Directors of the Fund was based in part on the investment adviser's agreeing not to raise the statute of limitations as a defense to any future suit the Board of Directors of the Fund might authorize against the investment adviser.

5. I believe that the course of action decided upon by the Board of Directors is logical and in the best interests of the Fund at this time. I thus believe that it would be in the Fund's best interests if this action were stayed until after the trial of the Goldman, Sachs suit, so that in light of the results of that suit the Board of Directors of the Fund can then consider what further action, if any, would be appropriate and in the Fund's best interests, as it originally planned to do.

Mary S. O'Connor
Mary S. O'Connor

Sworn to before me this

19th day of June, 1973.

Florence G. Dwyer
Notary Public

FLORENCE G. DWYER
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires October 9, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - -x

HOWARD M. LASKER, et ano., :

Plaintiffs, : 73 Civ. 552 (HFW)

-against- : NOTICE OF MOTION

HARRY G. BURKS, JR., et al., :

Defendants. :

- - - - - - - - - - - - - - - - - - -x

PLEASE TAKE NOTICE that upon the annexed affidavits of Roger T. Wickers, sworn to January 27, 1975, and Leon T. Kendall, sworn to January 23, 1975, and upon the pleadings and prior proceedings had herein, the undersigned will move this Court before Honorable Henry F. Werker at the United States Courthouse, Foley Square, New York, New York on February 20, 1975 at 4:00 p.m., or as soon thereafter as counsel can be heard, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure for an order dismissing the complaint herein, on the ground that by unanimous vote the Board of Directors of Fundamental Investors, Inc. (the party on whose behalf this derivative action has allegedly been brought) determined that, in its business judgment, this action is contrary to the best interests of the shareholders of Fundamental Investors, Inc.

New York, New York
January 28, 1975

SEWARD & KISSEL

By Eugene P. Souther
A Member of the Firm
Attorneys for Defendant
Fundamental Investors, Inc.
63 Wall Street
New York, New York 10005

Joining in This Motion:

DEWEY, BALLANTINE, BUSHBY, PALMER
& WOOD
Attorneys for Defendants Burks,
Hopkins, Kemmerer, Monroney,
Philips and Wade
140 Broadway
New York, New York 10005

POLLACK & SINGER
Attorneys for Defendants Anchor
Corporation, Burr, Chalker, Haire
and Hutchinson
61 Broadway
New York, New York 10006

TO: ARANOW, BRODSKY, BOHLINGER,
BENETAR, EINHORN & DANN
Attorneys for Plaintiffs
469 Fifth Avenue
New York, New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---------------------x

HOWARD M. LASKER, et ano., :
Plaintiffs, :
-against- :
HARRY G. BURKS, JR., et al., :
Defendants. :

---------------------x

73 Civ. 552 (HFW)

AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

ROGER T. WICKERS, being duly sworn, deposes and says:

1. I am Senior Vice President of Fundamental Investors, Inc. ("Fundamental"), the party on whose behalf this derivative action is allegedly brought, and I submit this affidavit in support of the motion by Fundamental to dismiss this action.

2. I have personal knowledge of the facts set forth in this affidavit, and I bring them to the attention of this Court to supplement the principal moving affidavit of Leon T. Kendall, sworn to January 23, 1975.

3. Fundamental is an open-end investment company (commonly known as a "mutual fund") registered under the Investment Company Act of 1940.

4. Anchor Corporation ("Anchor") is the investment adviser to Fundamental.

5. On November 26, 1969 Fundamental, which had a portfolio at that time worth approximately one billion dollars, purchased from Goldman, Sachs & Co., a commercial paper dealer, $20 million of 270-day notes of Penn Central Transportation Company as a short-term investment of unemployed cash.*

6. On June 21, 1970 Penn Central Transportation Company filed a Petition for Reorganization under the federal bankruptcy laws, and the notes were not paid at maturity, nor have they been paid to date. Penn Central Transportation Company is still in the process of being reorganized under the jurisdiction of Honorable John R. Fullam, United States District Judge for the Eastern District of Pennsylvania.

7. On November 4, 1970 Fundamental initiated an action, with three other plaintiffs,** in the United States District Court for the Southern District of New York against Goldman, Sachs & Co. ("the Welch action") for rescission of their purchases of the notes of Penn Central Transportation Company. The Board of Directors of Fundamental has kept this matter under continuous review since that time.

8. Nearly three years after the purchase of the Penn Central Transportation Company commercial paper by Fundamental, two stockholders of Fundamental commenced the instant derivative action ("the Lasker action") allegedly on behalf of Fundamental. On July 30, 1973, on motion of all defendants, Judge Gurfein

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* The purchase was actually made in four $5,000,000 amounts on November 26, December 2, 4 and 8, 1969.

** The three other plaintiffs were Welch Foods Inc., C.R. Anthony Company and Younker Brothers.

stayed the Lasker action pending the resolution of the claims of Fundamental in the Welch action.

9. On July 9, 1974 the claims of Fundamental in the Welch action were settled as follows: Goldman, Sachs & Co. took back the notes, paid Fundamental $5,250,000 in cash and assigned to Fundamental a 73.75% interest in the proceeds of the $20 million of notes in the reorganization proceedings.

10. On July 24, 1974, following the settlement of the claims of Fundamental in the Welch action, the Board of Directors of Fundamental retained Honorable Stanley H. Fuld, former Chief Judge of the State of New York as Special Counsel to advise and consult with it regarding this matter.

11. On December 18, 1974 and January 6, 1975, the Board of Directors of Fundamental met at special meetings. Following the deliberations, described in detail in the Kendall affidavit, by a wholly disinterested quorum consisting of five members of the Board of Directors,* none of whom was a director at the time of the events complained of and none of whom is a defendant in the Lasker action, the Board of Directors, acting solely by these five wholly disinterested persons, resolved that it was not in the best interests of the shareholders of Fundamental for the Lasker action to continue against Anchor and the other defendants, and instructed litigation counsel to Fundamental in this action (Messrs. Seward & Kissel) to move to dismiss this action.

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* The five wholly disinterested directors are: Leon T. Kendall, Louis F. Laun, Mary S. O'Connor, Beryl Robichaud and William J. Stephens.

All other defendants have joined in this motion by Fundamental.

Conclusion

The Board of Directors of Fundamental, acting by a wholly disinterested quorum, has determined that in its business judgment, this action allegedly brought on behalf of Fundamental is contrary to the best interests of Fundamental and its shareholders. Accordingly, this action should be dismissed.

Roger T. Wickers

Sworn to before me
January 27, 1975

Denise De Noble
Notary Public

DENISE De NOBLE
Notary Public, State of New York
No. 43-5938775
Qualified in Richmond County
Certificate filed in New York County
Commission Expires March 30, 1976

Affidavit of Leon T. Kendall, sworn to January 23,1975,in support
of motion to dismiss

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- x
HOWARD M. LASKER, et ano., :
Plaintiffs, : 73 Civ. 552 (HFW)
-against- : **AFFIDAVIT**
HARRY G. BURKS, JR., et al., :
Defendants. :
- x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

LEON T. KENDALL, being duly sworn, deposes and says:

1. I am a director of Fundamental Investors, Inc. ("Fundamental"), the mutual fund on whose behalf this derivative action has allegedly been brought. I am fully familiar with the facts set forth below and make this affidavit in support of Fundamental's motion to dismiss this action. The basis of this motion is that by unanimous vote the Board of Directors of Fundamental (acting by a wholly disinterested quorum) determined that this action is contrary to the best interests of the shareholders of Fundamental.

2. I attended the meeting of the Board of Directors of Fundamental held on July 24, 1974. Following a discussion of the settlement of Fundamental's action against Goldman, Sachs & Co. ("the Welch action"), the Board of Directors reviewed the status of this action. The Board of Directors determined that the five directors who (a) are not affiliated in any way with the investment adviser, Anchor Corporation ("Anchor"), (b) were not directors at the time of the events alleged in the complaint and

(c) are not defendants in this action ("the five disinterested directors") would, acting as a quorum pursuant to the by-laws, constitute the Board of Directors to decide what position Fundamental should take regarding this action.

The Five Disinterested Directors

3. For the Court's information, the following is a brief description of the five disinterested directors, together with the year in which each became a director:

Name	Year Elected to Board	Background
Leon T. Kendall	1974	President of Mortgage Guaranty Insurance Corporation, Milwaukee, Wisconsin (a New York Stock Exchange listed company with assets approaching $800,000,000). Vice President and Economist of the New York Stock Exchange from 1964 to 1967. President of the Association of Stock Exchange Firms from 1967 to 1972 and thereafter President of The Securities Industry Association until 1974.
Louis F. Laun	1971	Deputy Administrator of the Small Business Administration, Washington, D.C.; until 1971, Vice President of Celanese Corporation, manufacturer of synthetic fibers.
Mary S. O'Connor	1972	Director and Member of the Executive and Trust Committees of the Central Home Trust Company of Elizabeth, New Jersey, since 1959; Assistant Vice President of International Business Machine's Corporation from 1943 to 1947.
Dr. Beryl Robichaud	1973	Senior Vice President, McGraw-Hill, Inc., New York, New York. Director, Aetna Life and Casualty Corporation.

Name	Year Elected to Board	Background
William J. Stephens	1973	Director, Jones and Laughlin Steel Corporation, Pittsburgh, Pennsylvania; until 1972, Chairman and Chief Executive Officer of Jones and Laughlin Steel Corporation. Director, Equitable Gas Company, Pittsburgh.

Retention of Chief Judge Fuld as Special Counsel

4. To assist in our consideration, at the July 24 meeting, we five decided to retain special counsel. Pursuant to that decision, after reviewing his background and qualifications, we retained Hon. Stanley H. Fuld, former Chief Judge of the State of New York, to review all of the relevant aspects of this matter and to analyze the pertinent facts and relevant law and authorities. A copy of a biographical sketch of Chief Judge Fuld is attached as Exhibit A.

5. After several months of investigation, Chief Judge Fuld reported the results of his analysis of the facts and law in a memorandum dated December 5, 1974, a copy of which is attached as Exhibit B. Chief Judge Fuld reported that he had reviewed the complaint in this action and the relevant documents and depositions in the Welch action. He had also reviewed the files of Fundamental and Anchor relating to the purchase of the Penn Central commercial paper, and interviewed officers of Fundamental and Anchor who had knowledge of the relevant events. In addition, Chief Judge Fuld reviewed the corporate documents of Fundamental, studied the applicable statutes and regulations and conducted the necessary legal research.

6. Chief Judge Fuld advised us that

> "As a result of my analysis of the facts and the law, it is my opinion

> that there was no violation by Anchor or by the Fund directors of any provision of statute or of any common law or contractual obligation to the Fund, in connection with the acquisition and retention of the Penn Central commercial paper." (p. 2).

7. After receiving Chief Judge Fuld's December 5, 1974 opinion, each of us carefully reviewed it and several of us had questions regarding the subjects covered in the opinion and the alternatives which were available to the directors of Fundamental.

8. In response to questions raised by the five disinterested directors and on further review of his own, on December 18, 1974 Chief Judge Fuld delivered a supplemental analysis and opinion to the Board. A copy of his supplemental analysis and opinion is annexed as Exhibit C. Chief Judge Fuld had advised in his December 5 memorandum that it was up to the five disinterested directors, in the exercise of their discretion and business judgment, to determine what course Fundamental should follow. As previously noted, Chief Judge Fuld had advised us that in his opinion there was no violation of law by Anchor or by the directors of Fundamental. In his supplemental opinion, he went on to add that even if there were a possible claim, Fundamental did not necessarily have to prosecute that claim: he advised us that whether or not a corporation seeks to enforce in the courts a cause of action for damages is, like other business questions, a matter of internal management and is left to the discretion of the directors.

The December 18, 1974 Meeting:
Exploration of the Facts and Law

9. After receiving Chief Judge Fuld's supplemental opinion of December 18, 1974, the five disinterested directors met alone in a series of special meetings devoted exclusively to this subject. In that first special meeting I was designated to be Chairman of the five disinterested directors. We reviewed the supplemental opinion and discussed further the questions each of us had with respect to the facts, the law and the alternatives available. We also determined the procedure we would follow in conducting our inquiry, including the subjects to be dealt with, the order in which we would deal with them and whom we would question.

10. Following our private discussion, we invited the following persons to join the special meeting for the purpose of responding to our questions: Chief Judge Fuld; John R. Haire, Chairman and Chief Executive of Anchor; Donald L. Kemmerer and Charles F. Phillips, who are, and at the time of the events complained of, were unaffiliated directors of Fundamental; and Eugene P. Souther, Esq., litigation counsel to Fundamental in this action. As Chairman, I presided at that meeting and Mr. Souther served as Secretary. Minutes of that special meeting are annexed as Exhibit D.

11. The attached minutes show the order in which we proceeded in that meeting and the substance of our discussions. Each of us had given substantial consideration to the issues in preparation for the meeting and we pursued our questions in what I believe was a thoughtful and searching fashion.

12. The five disinterested directors asked Chief Judge Fuld, among other things, for his opinion as to (a) the merits of each of the claims made in this action, (b) whether Anchor had followed proper procedure under the circumstances at the time in determining to purchase and retain the Penn Central commercial paper, (c) the standards the five disinterested directors should apply in determining what course of action to pursue, and (d) the alternatives available to the Board. Chief Judge Fuld gave us his opinion on these subjects and emphasized that in making our decision we should exercise our good faith business judgment as to what was in the best interests of the shareholders of Fundamental.

13. Our questions to Mr. Souther pertained to the practical implications of each alternative. We discussed the nature and extent of pre-trial discovery and trial preparation to be expected, the cost, and the business interruption that might be experienced by Anchor and how that might adversely affect the interests of the shareholders of Fundamental. We also discussed the effect, if any, of the earlier decision of the Board of Directors to settle its case against Goldman, Sachs, and the subsequent jury award to the remaining plaintiffs in the Welch action.

14. We then interrogated John Haire. Our discussions with him are summarized in the annexed minutes and, to avoid repetition, will not be detailed here. Suffice it to say that the five disinterested directors had thought long and hard about the questions before them. All of us had carefully reviewed Chief Judge Fuld's thoughtful analysis. So armed, and with the advantage of hindsight, we critically examined the decision to purchase

the Penn Central commercial paper, the information available to Anchor at the time, the consideration Anchor gave before purchasing that paper, the procedure Anchor followed in making the investment, the information available to the Board of Directors at the time with respect to that purchase and other purchases of commercial paper, the identity of other "sophisticated investors" who had purchased Penn Central commercial paper during the relevant period, the identity of those purchasers of such paper who held it at the time of the Penn Central reorganization, the anticipated effect on the shareholders of Fundamental if this action were to be prosecuted either under the control of Fundamental or under the control of the two shareholders who brought it, the anticipated effect on the investment adviser from the continued prosecution of the action and how that would affect Fundamental's shareholders, and the ability of Anchor to respond in damages should a judgment against it be obtained.

15. After excusing Messrs. Phillips, Kemmerer and Haire, we five continued our discussion with Chief Judge Fuld, reviewing the subjects which had been considered during the earlier part of the meeting and the criteria we should apply in reaching our decision.

16. When there were no more questions, we excused Chief Judge Fuld and Mr. Souther. In that private portion of the meeting we agreed that we wished to give further consideration to the subject and adopted a procedure for that consideration. Each director would give further separate thought to the matter and convey any additional questions to me for response. I was to

secure replies to these questions through our special counsel and litigation counsel. We agreed not to have any contact with anyone affiliated with Anchor until we had reached our decision.

December 18, 1974 - January 6, 1975: Further
Reflection by the Disinterested Directors

17. During late December and early January I personally spoke by telephone with each of the other four disinterested directors and gathered the questions they wanted answered. Indicative of the consideration we were each giving to the matter is the letter written to each of us by William J. Stephens on December 31, 1974. A copy of that letter is attached as Exhibit E.

18. I reviewed the questions for Chief Judge Fuld in a conference call with him and Mr. Souther on January 3, 1975. The essence of that conversation was to reconfirm that we were to make our decision, whatever it was to be, in the exercise of our good faith business judgment as to what was in the best interests of the shareholders of Fundamental. Because the telephone connection at times was not satisfactory, I thereafter personally spoke with Chief Judge Fuld and repeated the discussion.

The Meeting of January 6, 1975:
The Vote to Dismiss

19. The second special meeting of the Board of Directors to review this subject was held on January 6, 1975. The other directors persent were: Louis F. Laun, Dr. Beryl Robichaud and William J. Stephens. Mrs. Mary S. O'Connor was abroad, but she and I had spoken by telephone and she had told

me her decision as to the action Fundamental should take. In addition, Mr. Souther was also present to act as Secretary of the meeting.

20. Following the review and approval of the minutes of the first special meeting, I reported to the Board the events that had transpired since our last meeting, including my telephone conversation on January 3 with Chief Judge Fuld. Mr. Souther then replied to certain questions from Board members. The questions and his answers are summarized in the minutes of that special meeting, a copy of which is attached as Exhibit F. We all confirmed that we had not communicated with any officer or employee of Anchor since the December 18, 1974, special meeting.

21. We then reviewed in detail each of the alternatives available to Fundamental. Our consideration is summarized in the minutes of the meeting. Our overriding and only consideration was what course was in the best interests of the shareholders of Fundamental.

22. We decided that the prosecution of this action was contrary to the best interests of the shareholders of Fundamental and that counsel should be directed to seek to dismiss the action. Among the factors we considered were:

(a) Chief Judge Fuld's opinion that there is no merit to the action and little likelihood of its success;

(b) The business interruption to Anchor, distraction of its personnel and the likely inability for it to attract and maintain personnel during pendency of the action necessarily would be harmful to the shareholders of Fundamental;

(c) If the action were to proceed against Anchor with the acquiescence or under the control of Fundamental, the adversary relationship that would be created between Fundamental and Anchor and the attendant serious distraction of Anchor's personnel from their efforts on behalf of the shareholders of Fundamental would leave us no practical alternative but to remove Anchor as investment adviser and to seek to retain a new investment adviser; this would necessarily result in delay, uncertainty and an inevitable lapse in the management of Fundamental's affairs to the serious detriment of its shareholders;

(d) Anchor had acted in good faith and in what it believed was in the best interests of Fundamental's shareholders in purchasing the Penn Central commercial paper;

(e) Anchor had acted reasonably and had followed procedures prudent at the time in light of the then generally held belief that commercial paper was equivalent to cash;

(f) A vast number of other institutional investors, including many major banks in New York City and throughout the country and certain major mutual funds, had also believed that Penn Central was a sound business enterprise and had purchased Penn Central commercial paper at the time, and many such investors still held that paper when Penn Central petitioned for reorganization;

(g) To take no position at all and thereby to allow two of the more than 90,000 shareholders to determine the course of this action would not be a decision at all, but an avoidance of our obligation to all the shareholders;

(h) Chief Judge Fuld's advice that an investment adviser is not a guarantor of the investments it makes and can only be charged for breaches of contract or of the standards applied by the pertinent statutes and regulations. Chief Judge Fuld had analysed the facts and law and had concluded that Anchor was not at fault and that there was little likelihood that Anchor would be held to have violated any statute or regulation or to have breached any agreement or duty;

(i) Given Chief Judge Fuld's opinion, if the action were to proceed, there could be unnecessary costs to the shareholders of Fundamental for legal fees, both for its own counsel and for the director defendants, who would be entitled to reimbursement of counsel fees if they were found to to be liable to Fundamental; and

(j) Even if there were a recovery of the theoretical maximum amount of damages, the net result to the shareholders of Fundamental would be little more than a net recovery of 10 cents per share, or approximately 2% of Fundamental's net asset value. The remote chance of recovering that small amount was not worth the risk of the serious damage to Fundamental's shareholders which proceeding with this action might produce.

23. After several hours of consideration, on motion of Mr. Louis F. Laun, seconded by Dr. Beryl Robichaud, the five disinterested directors (Mrs. O'Connor's vote being cast by me in accordance with her instructions to me*) unanimously decided to instruct counsel to move to dismiss the action as being contrary to the best interests of the shareholders of Fundamental.

24. I therefore respectfully urge that this Court grant Fundamental's motion to dismiss the complaint.

Leon T. Kendall
Leon T. Kendall

Sworn to before me
January 23, 1975

Jon Paul Robbins
Notary Public

JON PAUL ROBBINS
Notary Public, State of New York
No. 31-4520299
Qualified in New York County
Commission Expires March 30, 1976

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* Mrs. O'Connor reaffirmed her vote in the presence of all of us at a special meeting held for that purpose on January 22, 1975.

Exhibit A- to affidavit of Leon T. Kendall, sworn to January 23,1975,
Biographical sketch of Stanley H. Fuld

BIOGRAPHICAL SKETCH
OF
STANLEY H. FULD

STANLEY HOWELLS FULD, born on August 23, 1903, in New York City. Married to Florence Geringer on May 29, 1930; two children, Hermine (Mrs. Maurice N. Nessen) and Judith (Mrs. Frank Miller) and six grandchildren.

Educated in the public schools of New York City, he was graduated, Cum Laude and Phi Beta Kappa, from the College of the City of New York in 1923, receiving a Bachelor of Arts Degree. He studied law at Columbia Law School, was editor of its Law Review and received his Bachelor of Laws Degree in 1926.

He was admitted to the New York Bar in 1926 and was in private practice until 1935 when he joined the Special Rackets Investigation under the Honorable Thomas E. Dewey. He served as Assistant District Attorney of New York County under Mr. Dewey and Frank S. Hogan until 1944 as head of the Indictment and Appeals Bureaus. In 1944, he returned briefly to private practice and also served (during 1944-1945) as Special Assistant Attorney General.

He was appointed Associate Judge of the Court of Appeals of the State of New York, the State's highest court, by Governor Dewey in April 1946, was thereafter - in November 1946 - elected to that office for a full fourteen-year term and, in 1960, was re-elected for a further term. Then, in November 1966, following nomination by all major political parties, he was elected Chief Judge of the Court of Appeals and Chief Judge of the State of New York. In such capacity, he served as Chairman of the Judicial Conference of the State of New York and of its Administrative Board and became the first Chairman of the New York Fair Trial Free Press Conference. He continued in those posts until, reaching the age of 70, he retired, as required by the Constitution of this State, as Chief Judge of the Court of Appeals on December 31, 1973.

He joined Kaye, Scholer, Fierman, Hays & Handler as Special Counsel on January 1, 1974.

Lectured and taught law at the Salzburg Seminar in American Studies, held in Salzburg, Austria, and has been a member of the faculty of the Seminar of Appellate Judges at New York University Law School in New York City. He is author of numerous articles on legal subjects and on legal administration. He is a member of the American Bar Association, the New York State Bar Association and an honorary member of the Bar Association of the City of New York and of the County Lawyers Association.

He is Chairman, National News Council, 1974; Chairman, Board of Visitors of The City College of The City University of New York, 1973--; Chairman, Board of Directors of The Jewish Theological Seminary of America, 1966-1974, and Chairman of its Executive Committee, 1973--; President, The Institute for Religious & Social Studies, 1974--; Fellow, American Academy of Arts & Sciences, 1967--; Member, Board of Trustees of Beth Israel Medical Center (NYC), 1971--; Member, Board of Directors of Empire State Report, 1974--; Member, Board of Trustees of Central Synagogue (NYC), 1958--; Member, Board of Directors of Columbia Law Review Association, 1950--; Member, Board of Visitors of Columbia Law School, 1951--; Member, Advisory Council for Law Center, State University of New York (Stony Brook), 1974--; Member, Board of Directors of Phi Beta Kappa Associates, 1949--; Chairman, New York Fair Trial Free Press Conference, 1967-1973; Honorary Chairman, New York Fair Trial Free Press Conference, 1974--; Member, Board of Trustees, National Center for Automated Information Retrieval, 1971--;* Member, Board of Directors, Hunter College Student Social, Community and Religious Clubs Association, 1948--, and Chairman of its Board of Directors, 1974--.

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* Successor to Lawyer's Center for Electronic Legal Research: served as Member of Board of Trustees from 1966-1971.

Awarded a number of honorary degrees of Doctor of Laws, including those from Hamilton College (1949), Columbia University (1959), Union College (1961), Yeshiva University (1962), New York Law School (1962), New York University (1963), The Jewish Theological Seminary of America (1964), Syracuse University (1967), St. John's University (1970) and The City College of The City University of New York (1972).

Awarded the Townsend Harris Medal from The Alumni Association of The City College of New York "for notable achievement" (1947); the Benjamin N. Cardozo Award from the Knights of Pythias "for giving living reality to the ideals of Benjamin N. Cardozo" (1951); the Joseph M. Proskauer Award from the Lawyers' Division of the New York Federation of Jewish Philanthropies "in recognition of leadership and service in the finest traditions of the law" (1959); the Chief Justice Harlan Fiske Stone Award from the Association of Trial Lawyers of the City of New York (1966); the "Medal for Excellence" from the Columbia Law School Alumni Association (1967); the John Peter Zenger Award from the New York State Society of Newspaper Editors (1970); the Medal for "Distinguished Service in the Law" from the New York State Bar Association (1971);

the Medallion for "Distinguished Public Service" from the Nassau County Bar Association (1971); the John H. Finley Award for "Distinguished Service to the City of New York" from The Alumni Association of The City College of The City University of New York (1971); the Award of Merit from the Lotos Club (1972); the Earl Warren Medal for "distinguished contributions to humanity and civilization" from The Jewish Theological Seminary of America (1972); the Martin Luther King Medal for "lifelong dedication to humanitarian ideals" from The City College of The City University of New York (1974).

Home address: 30 Park Avenue, New York, N.Y. 10016.
Office address: 425 Park Avenue, New York, N.Y. 10022.

Exhibit B to Affidavit of
Leon T Kendall, sworn to
January 23,1975- Report of
Stanley H. Fuld to Board
of Directors of Fundamental
Investors, Inc. dated
December 5,1974

STANLEY H. FULD
425 PARK AVENUE
NEW YORK, N.Y. 10022

December 5, 1974

PRIVILEGED AND CONFIDENTIAL

Board of Directors
of Fundamental Investors, Inc.
Westminster at Parker
Elizabeth, New Jersey

Dear Sirs:

In November and December of 1969, Fundamental Investors, Inc. (the "Fund") purchased, in four separate lots, commercial paper of Penn Central Transportation Company ("Penn Central") from Goldman, Sachs & Co., in the aggregate amount of $20,000,000. On June 21, 1970, Penn Central filed a petition for reorganization under Section 77 of the Bankruptcy Act, and the commercial paper was not paid at maturity.

In February, 1973, a stockholders' derivative suit was brought against Anchor Corporation ("Anchor"), the Fund and the directors of the latter, based in substance on the claim that Anchor (the Fund's investment adviser) and the Fund's directors, in both the purchase and the retention of the Penn Central commercial paper, breached statutory and other obligations to the Fund by virtue of the fact that they "relied solely and exclusively on Goldman, Sachs and made no independent investigation of the finances of Penn Central or the quality of its commercial paper." (see p. 10 below).

You retained me as special counsel to advise you with respect to the future course of action to be followed in connection with the investment made by the Fund in the commercial paper of Penn Central.

I have reviewed the complaint in the derivative action, the relevant pleadings and depositions in the action entitled "Welch Foods, Inc., et al. v. Goldman, Sachs & Co." brought by several parties, including the Fund, in the United States District Court for the Southern District of New York.[1] I have also had the files of the Fund and of its adviser, Anchor, relating to the purchase of that commercial paper reviewed. I have interviewed certain officers and employees of the Fund and have also had certain other officers and employees of the Fund interviewed, the Fund's constituent documents and the applicable statutes and regulations reviewed, and the necessary legal research conducted.

As a result of my analysis of the facts and the law, it is my opinion that there was no violation by Anchor or by the Fund directors of any provision of statute or of any common law or contractual obligation to the Fund, in connection with the acquisition and retention of the Penn Central commercial paper. At the outset I set forth the relevant facts which, despite the volume of material involved, may be summarized relatively briefly, and then consider the applicable law and the possible courses of action to be followed by the current Fund directors.

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[1] The action by the Fund resulted in a settlement described below (infra, p. 9).

Facts

The Fund has in recent years had large amounts of cash on hand, partly to be available to pay for securities which the Fund managers found it desirable to purchase, and partly to be available for redemptions of Fund shares. During the latter part of 1965 Anchor, in order to increase the Fund's income, began to invest part of its temporarily idle cash in commercial paper. Responsibility for determining the amounts and maturities of the commercial paper purchased was placed in the office of the Fund's Treasurer, an employee of Anchor, who, in consultation with the various Fund managers and in the light of their projected purchases and of other cash needs of the Fund, decided how much money could be invested and for how many days.

Until the Fall of 1969 all commercial paper was purchased directly from among a group of eight issuers initially selected and approved by the Fund's Investment

Committee.[2] In order to provide added liquidity in case of an unexpected need for cash by the Fund, the Treasurer insisted that each issuer agree to repurchase its paper from the Fund on demand. Purchases were made on virtually a daily basis, and officials of these issuers were in frequent telephone communication with the Fund's Treasurer, to negotiate the amounts, rates and maturities of paper which might be purchased by the Fund. Because he was continually purchasing paper from these companies, the Treasurer sought, through periodic questioning of these officials, review of published quarterly financial statements and inquiry of the Fund's bank custodian, to keep current on the credit status of the issuers, including the extent of their outstanding commercial paper and of their unused bank lines.

From time to time Anchor was solicited by dealers who sought to sell to the Fund the commercial paper of industrial companies which did not sell their paper directly. Initially the paper sold by dealers offered substantially the same rate of return as that of direct issuers, but afforded less flexibility since the amounts, rates and maturities were fixed in advance whereas direct issuers could negotiate by telephone concerning these matters in order to meet the Fund's needs on a given date.

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[2] These eight companies were among the nation's major finance companies: General Motors Acceptance Corporation, Sears Roebuck Acceptance Corp., Montgomery Ward Credit Corp., J. C. Penney Credit Corporation (now J. C. Penney Financial Corporation), C.I.T. Financial Corporation, Commercial Credit Co., Ford Motor Credit Company, and Chrysler Financial Corporation.

By the Fall of 1969 the rate differential, or rate of return spread, between dealer and direct paper had widened and the volume of paper and the variety of issuers offered by dealers increased to the point where the Fund's specific needs could be met. Arthur M. Kesselhaut, the Fund's Treasurer, brought this to the attention of John Haire, President of Anchor and of the Fund, and suggested that some dealer-placed commercial paper be purchased for the Fund. Haire approved the making of purchases from dealers, provided that certain guidelines were adhered to, similar to those followed in connection with purchases made directly from issuers. These were principally that the paper should bear a National Credit Office rating of "prime", no more than 10% of the outstanding paper of any issuer should be purchased, and the dealer should agree to repurchase the paper at the Fund's request. Kesselhaut discussed these requirements with representatives of Goldman, Sachs & Co., Lehman Commercial Paper Incorporated and A. G. Becker & Co. Incorporated, large dealers in commercial paper. In addition to the requirements stated above, he also insisted that the issuer be listed on a national securities exchange.

In the course of his discussions with Goldman, Sachs & Co., Kesselhaut was told that "each company they [Goldman, Sachs] represented was analyzed by a credit man at Goldman and that they had current financial information on every company they represented", the implication to him being that they "knew as much about the company as could be known". Kesselhaut understood that the two other dealers likewise made a current credit analyses of the companies whose paper they offered.

Several weeks after the Fund had begun to purchase paper from dealers, a representative of Goldman, Sachs & Co. called and offered Arthur Burach, Kesselhaut's assistant, $20 million of commercial paper of each of Penn Central and Chrysler Corporation, yielding 9% for 270 days (the maximum maturity of such paper). Kesselhaut was interested in the offer since he believed that interest rates had turned downward and would continue to fall, and he saw an opportunity to obtain a favorable rate of interest for a maximum period.

The approval of one of the three Fund managers was normally required in connection with each purchase of commercial paper, but because of the size and duration of the proposed purchase a conference was held, attended by Robert

Daniel (chairman of Anchor's Investment Committee), Kesselhaut, and all three of the Fund managers, Robert Baines, Ronald Welburn and Bryant Hanley.[3/] The discussion dealt with the principle of a purchase of 270-day paper as well as the availability of the cash required, and the two purchases were approved from this point of view. However, since not all the cash was immediately available a schedule of purchases of Penn Central paper was adopted, with $5 million each to be purchased on four separate occasions at intervals of several days during the period November 28, 1969 to December 8, 1969. The $20,000,000 of Chrysler paper was likewise to be purchased in four equal $5,000,000 installments at about the same time. The financial condition of Penn Central was not discussed.

In making purchases of commercial paper from dealers, including the Penn Central paper, Kesselhaut believed that the Fund was sufficiently protected by (i) the "prime" rating given by the National Credit Office, one of the principal national rating organizations, (ii) the current credit

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[3/] This is Kesselhaut's firm recollection. When interviewed, Baines and Welburn did not recall the meeting but acknowledged that they had either initialled approval of the purchase or had been told of the purchase shortly after it was made.

analysis of each issuer which -- based on representations by Goldman, Sachs & Co. and the other dealers -- he believed was being performed by the dealer and formed the basis for the dealer's recommendation which he understood was implicit in its offer of the paper, (iii) the short-term nature of the investment, (iv) the fact that the issuer was a listed company whose name he recognized and the Fund managers were likely to also recognize, and (v) the likelihood that the Fund manager who approved the purchase would have alerted him to any seriously adverse information which he possessed about the issuer and which Kesselhaut himself might not have had. Because of this belief that the criteria established by Anchor provided sufficient protection -- a belief buttressed by the financial community's general acceptance of commercial paper as a safe money-market instrument -- Kesselhaut did not undertake, or have any other employee of Anchor perform, an independent analysis of the financial condition of issuers (including Penn Central) whose paper was offered to him by dealers, or any continuing review during the period in which the purchased paper was held by the Fund.

An article appeared in the May 18, 1970 issue of Barron's entitled "Beautiful Balloon? Rapid Growth of the

Commercial Paper Market May Be Risky." The article did not mention Penn Central but expressed a general concern about the safety of commercial paper. Prompted by the article, the Fund sought to reduce the amount of its Penn Central and Chrysler commercial paper holdings by requesting Goldman, Sachs & Co. to repurchase half of both holdings, but Goldman, Sachs refused to repurchase the Penn Central paper.

As stated earlier, on June 21, 1970 a petition for reorganization of Penn Central was filed and its commercial paper was not paid at maturity.

The Action Against Goldman, Sachs & Co.

Late in 1970 the Fund and three other parties commenced a suit against Goldman, Sachs & Co. in which the Fund sought to recover its $20 million investment. The complaint alleged that, in connection with the sales of Penn Central commercial paper, Goldman, Sachs made numerous misstatements of material facts and omitted to state numerous material facts in violation of Section 12(2) and Section 17(a) of the Securities Act of 1933, Section 10(b) of the Securities Exchange Act of 1934, Section 352-c of the General Business Law of the State of New York, and the common law. In July, 1974, the Fund with the approval of its full Board of Directors settled its suit against Goldman, Sachs, and received

$5,250,000 in cash; although the Fund also retained a 73.75% interest in the commercial paper which will make it whole if the notes are paid, the likelihood of any additional amounts being recovered as a result of this settlement is, at the present time, uncertain.

The three other plaintiffs in the action pressed the case to trial, and on October 9, 1974 a jury verdict was rendered in their favor for $3,000,000 -- the amount of their loss -- plus interest. The jury, in reaching this verdict, must of necessity have concluded that Goldman, Sachs & Co. had withheld from its customers material non-public information concerning Penn Central.

The Derivative Action

In February, 1973 a derivative action entitled Lasker et al. v. Burks et al. was commenced by two shareholders of the Fund in the United States District Court for the Southern District of New York against Anchor and all of the directors of the Fund who were in office when the Penn Central paper was purchased and held. The Fund is a nominal defendant in the suit.

The complaint alleges that the Fund's purchases of the Penn Central paper were made by Anchor and the Fund's directors in sole reliance upon Goldman, Sachs & Co., without an independent investigation of Penn Central's financial condition or the quality of its commercial paper, and that such an investigation would have revealed a number of material adverse facts concerning Penn Central. The failure to make such an investigation is alleged to constitute a failure by Anchor to meet its responsibilities as the Fund's adviser; and it is also alleged that the Fund directors knew (or should have known) of, and acquiesced in, Anchor's failure to meet its responsibilities.

The complaint further recites that Anchor and the Fund directors failed to conduct a continuous review of the financial condition of Penn Central subsequent to the purchase of the paper -- which review would have revealed a number of other material adverse facts -- and that they failed to make adequate attempts to resell the paper.

It is asserted that the foregoing conduct was in violation of (i) Section 36 of the Investment Company Act of 1940, (ii) Section 206 of the Investment Advisers Act of 1940, (iii) the defendants' common law fiduciary duty to the Fund, and (iv) the terms of the advisory contract between Anchor and the Fund.

Finally, the complaint alleges that, when the amount of Penn Central commercial paper outstanding fell far below the initial $200,000,000, the Fund's holdings became much more than 10%, thus violating the Fund's fundamental policy that it would not "hold" more than 10% of the "outstanding securities" of a single issuer. This is claimed to constitute a violation of Section 13(a)(3) of the Investment Company Act of 1940.

The Lasker suit had been stayed pending the resolution of the suit brought by the Fund against Goldman, Sachs & Co., and the defendants (including the Fund) have not yet filed their answers. With the settlement in the latter suit concluded, the plaintiffs in the derivative suit have indicated their intention to carry it forward.

Discussion of Law

The complaint in the derivative action sets forth what appear to be all of the possible grounds for asserting liability against Anchor and the Fund directors for the loss which the Fund incurred because of its purchase of the Penn Central commercial paper (the "Penn Central loss"). Accordingly, in considering whether such liability exists and if so what action you should take in order to enforce it, I shall treat the various claims contained in the complaint.

Section 36 of the Investment Company Act

It is my opinion that neither Anchor nor any Fund director is liable to the Fund under Section 36 of the Investment Company Act of 1940 for the Penn Central loss.

Section 36 -- as it read at the time of the Fund's purchase of the Penn Central paper and until after the Penn Central bankruptcy proceedings were begun -- authorized the Securities and Exchange Commission to bring an action against an officer, director or investment adviser of a registered investment company for "gross misconduct or gross abuse of trust in respect of" the investment company. Although Section 36 expressly provides for actions to be brought by the Commission, the courts have held that private suits may likewise be brought under its provisions. Brown v. Bullock, 194 F. Supp. 207 (S.D.N.Y. 1961), aff'd, 294 F.2d 415 (2d Cir. 1961); Moses v. Burgin, 445 F. 2d 369 (1st Cir. 1971).

It seems clear -- from the legislative history of Section 36, from a 1970 amendment to that section, and from judicial interpretation -- that the use of the language "gross misconduct or gross abuse of trust" was deliberate and was designed to cover the type of conduct it explicitly describes and not mere negligence. Initially, Section 36 was drafted so as to make the proscribed conduct a criminal act, and the word "gross" was "added to insure that only the more serious kinds of abuse", not mere negligence, "would be subject to sanctions" and render a person guilty of a crime. See Eisenberg & Phillips, "Mutual Fund Litigation - New

Frontiers for the Investment Company Act," 62 Columbia Law Review 73, 99. Although the criminal sanctions were removed from the draft bill and replaced by the provision for actions brought by the Commission, the language describing the prohibited conduct remained. In Rosenfeld v. Black, 445 F.2d 1337 (2d Cir. 1971), although the court held that an investment adviser to a mutual fund violated a fiduciary duty when it realized profits in connection with the appointment of a new adviser upon its recommendation, the court did not predicate its decision on Section 36, saying of that provision (p. 1346):

> "Words and remedies such as these were clearly addressed to highly reprehensible conduct [citation omitted]; we would not dream of suggesting, much less holding, that [the adviser's] actions were so culpable."

Indeed, an amendment to Section 36, made in December 1970 -- about a year after Anchor had purchased the Penn Central paper and some six months after the petition for its reorganization had been filed -- serves to point up the distinction between Section 36's earlier standard of "gross" misconduct or "gross" abuse of trust and mere "nonfeasance of duty" or the like. The amendment added a new subsection "(b)" dealing with a breach of fiduciary duty in connection with the adviser's compensation, and at the same time deleted, from what became subsection "(a)", the words "gross misconduct or gross abuse of trust" and authorized Commission action where there is "a breach of fiduciary duty involving personal misconduct". In explaining the change, the Senate Committee on Banking and Currency wrote (Part F, Senate Report No. 91-184 to Accompany S. 2224 at 36):

> "* * * your committee does not intend to limit the Commission under this section to situations where an actual intent to violate the law can be shown or to acts of affirmative misconduct. In appropriate cases, nonfeasance of duty or abdication of responsibility would constitute a breach of fiduciary duty involving personal misconduct." (emphasis supplied)

Under these circumstances I conclude that even if -- contrary to the opinion expressed herein -- Anchor were deemed to have breached an obligation to the Fund in relying to the extent it did on Goldman, Sachs and on the National Credit Office, there was clearly no "gross misconduct or gross abuse of trust" in connection with the purchase of the Penn Central paper or its retention. The conditions adopted by Anchor for the purchase of dealer paper were believed by it to constitute a sufficient safeguard and, in reaching that conclusion, Anchor clearly acted reasonably and in good faith. Accordingly, in my opinion there is no liability under Section 36 on the part of Anchor or the directors of the Fund.

Section 206 of the Investment Advisers Act

It is also my opinion that neither Anchor nor any Fund director is liable under Section 206 of the Investment Advisers Act of 1940 for the Penn Central loss.

Section 206 is the anti-fraud section of that statute, corresponding with Section 17(a) of the Securities Act of 1933 and Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder. Section 206 reads, in pertinent part, as follows:

> "It shall be unlawful for any investment adviser, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly --
>
> (1) to employ any device, scheme, or artifice to defraud any client or prospective client;
>
> (2) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client;
>
> ****
>
> (4) to engage in any act, practice, or course of business which is fraudulent, deceptive, or manipulative...."

Section 206, like Section 17(a) and 10(b), does not expressly provide for civil liability. The courts have held that Sections 17(a) and 10(b) do give rise to civil liability, and very recently the District Court for the Southern District of New York expressly decided that Section

206 likewise confers a private right of action. Bolger v. Laventhol, Krekstein, Horwath & Horwath, CCH Fed. Sec. L. Rep. ¶ 94,618 (S.D.N.Y. 1974).[4]

The leading case under Section 206 of the Investment Advisers Act is SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180 (1963), in which the Supreme Court held that the SEC could obtain an injunction requiring an investment adviser to disclose its practice of purchasing a security shortly before recommending a purchase to its clients for long-term investment and then selling at a profit immediately after the rise in price caused by the clients' purchases. The Court held that the absence of misrepresentations and an intent to injure was immaterial in an injunctive action by the Commission, but acknowledged that it "is not necessary in a suit for equitable or prophylactic relief to establish all the elements required in a suit for monetary damages." 375 U.S. at 193. This distinction between the elements required in an injunctive suit and a damage action is also present in suits arising under Section 10(b).

My research has discovered no case which considers whether some form of fraudulent intent is essential to establish a private right of action under Section 206. In the absence of relevant authority under Section 206, it is likely that the courts would look to the analogous provisions of Section 10(b). The rule in the Second Circuit has long been that some element of scienter (i.e., knowledge or wilfulness) is essential in suits brought under Section 10(b), see Fischman v. Raytheon Mfg. Co., 188 F.2d 783 (2d Cir. 1951), and the rule continues to be that "mere negligence is insufficient." Leasco Corporation v. Taussig, 473 F.2d 777, 785 (2d Cir. 1972); Shemtob v. Shearson, Hammill & Co., 448 F.2d 442 (2d Cir. 1971). Moreover, the District Court for the Southern District in Jones Memorial Trust v. Tsai Investment Services, Inc., 367 F. Supp. 491 (1973), recently considered Section 206 in a case in which the plaintiff sought damages for the diminution in value of its investment portfolio, claiming that the investment adviser had mismanaged "the process of researching and recommending investment transactions." The Court found no credible evidence of such mismanagement, stating in the course of its opinion (at 497):

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[4] It should be noted that there are two recent decisions in other districts to the contrary.

> "The plain words of Section 206 of the Investment Advisers Act of 1940 make no mention of mismanagement, but speak solely and exclusively to concealment and misrepresentation."

In my opinion the element of fraudulent intent is necessary to establish a private cause of action under Section 206. Consequently, since for the reasons stated in my discussion of Section 36, there is a total absence of any such intent, it follows that there is no liability under Section 206 on the part of Anchor or the Fund directors.

Common Law Liability of Anchor for the Purchase

Concededly, Anchor did not make its own independent investigation of the financial condition of the issuers whose commercial paper was offered to it by selected dealers. It did, however, adopt a number of safeguards which it believed provided sufficient protection, particularly with respect to short-term money market instruments which had general acceptance in the financial community: (1) the paper had to be rated "prime" by National Credit Office, one of the principal rating organizations in the country, which presumably made an appropriate credit investigation; (2) the paper had to be recommended by a nationally known and respected investment banking firm, which had represented that it performed its own credit analysis of the issuer; and (3) the name of the issuer had to be recognized by the Fund Treasurer, and presumably by the Fund manager who also approved the purchase -- the presumption being that, if either knew of any reason not to purchase the issuer's paper, he would so indicate. The Penn Central paper met these conditions; in connection with item (3) above, it should be noted that Penn Central was undoubtedly regarded generally as a mainstay of the nation's transportation system, and that its viability appeared unquestioned.

It is my opinion that, in purchasing the Penn Central paper under these circumstances, Anchor acted in good faith and in what should be regarded as a reasonable and prudent manner. Accordingly, if the rule applicable to investment advisers is the same as that applicable to corporate directors (who must act "in good faith and with that degree of diligence, care and skill which ordinarily prudent men would exercise under similar circumstances in like position"),[5] or as the rule applicable in general to trustees (who must use "such care and skill as a man of ordinary prudence would exercise in dealing with his own property"),[6] I believe it is clear that Anchor is not liable for the Penn Central loss on account of its purchase of the paper.

Because this rule refers to "ordinarily" prudent men or to men of "ordinary" prudence, it may be argued that it is inadequate in the case of an investment adviser which holds itself out as possessing special skills and competence. The rule generally applicable to persons who hold themselves out in this manner is that they must act with "the skill and knowledge normally possessed by members of [their] profession or trade";[7] similarly, if a trustee procures his appointment as trustee by representing that he has greater skill than that of a man of ordinary prudence, "he is under a duty to exercise such skill."[8] This is the rule which I believe should apply to the present case.

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[5] See, e.g., N.Y. Business Corporation Law, § 717, N.J.Business Corporation Act § 14A:6-14.

[6] See, Restatement, Second, Trusts § 174.

I have found no authority, however, which attempts to spell out precisely what this means in the case of an investment adviser.[9] In my opinion the test is one of reasonableness and prudence under the circumstances, and it is also my opinion that Anchor met that test, unless -- which appears unlikely -- there can be developed substantial evidence that, in 1969, no investment adviser would or did rely in the purchase of commercial paper on the combination of factors relied on by Anchor.

In this connection it is noteworthy that among the purchasers of Penn Central paper after Anchor's purchases were American Express Company, California Institute of the Arts, Carnegie-Mellon University, Franklin Savings Bank, Getty Oil Corp., Marine Midland Bank, United States Trust Company of New York and University of Southern California.

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[7] See, Restatement, Second, Torts § 299A.

[8] See, Restatement, Second, Trusts § 174.

[9] Indeed, in Jones Memorial Trust v. Tsai Investment Services, Inc., 367 F. Supp. 491 (S.D.N.Y. 1973) the court stated that there was no evidence whatever produced at the trial as to what the standard of care is for a properly managed investment advisory service.

I must point out, however, that in the absence of any authority, the contention can be made -- as it is in the complaint in the derivative action -- that since an investment adviser maintains an organization trained in financial analysis and performs such analysis of a very large number of companies, and since it is paid for investment management which presumably is based on this analysis, such an adviser should, as a matter of law, be held to a duty to make its own investigation and analysis, as well as its own independent decision based thereon for every purchase, not only of longer-term investments but also of short-term money market instruments such as commercial paper.

In support of such a contention it could be pointed out that an investment adviser is for some purposes a fiduciary, and that as a general rule a trustee (i.e., a fiduciary) must not rely on a third party to select investments (Restatement, Second, Trusts, § 171). I turn now to this argument.

The rule as set forth by § 171 of the Restatement of Trusts is as follows:

> "The trustee is under a duty to the beneficiary not to delegate to others the doing of acts which the trustee can reasonably be required personally to perform."

This is amplified by Comment h, which states:

> "A trustee cannot properly delegate to another power to select investments."

The cases in which this rule has been invoked to hold a trustee liable have involved a virtually complete delegation of the trustee's powers and functions. For example, in Meck v. Behrens, 252 P.91 (Wash. 1927), the trustees had by contract turned over to a corporation the entire administration of the trust property, and in In re Shintaffer's Estate, 4 P.2d 764 (Kans. 1931) an executor had authorized another individual to make investments without any supervision by the executor.

I have found no case which holds that a trustee may not decide to make -- or retain -- an investment based upon the recommendation of a qualified professional, under circumstances such as those in which Anchor acted. On the contrary, in In re Kohler's Estate, 33 A.2d 920 (Pa. 1943), the court refused to surcharge an executrix who had entered into an agency agreement with a trust company which was to make such investments as she should authorize and was to suggest suitable investments. The court held that since the executrix maintained constant contact with the agent, knew of the transactions, and approved them there had been no improper delegation; it stated that if full power to manage and invest had been turned over, the executrix would have been liable for any loss. Compare In re Estate of Quinlan, 273 A.2d 340, 342 (Pa. 1971), where the court stated that the executor had "permitted the Bank to exercise on his behalf practically all of the duties and functions of an executor" and held that "this delegation is, of course, improper."

Accordingly, it is my opinion that there was no improper delegation by Anchor within the meaning of the above-described rule.

Moreover, if the "no delegation" rule is intended to apply to trustees a rigid test which goes beyond that of reasonableness and prudence under the circumstances, and to impose liability without regard to good faith and the reasonableness of the action actually taken, it is my belief that it should not be extended to apply to investment advisers, who certainly are not trustees in the strict sense.

It is true that some courts have referred to an investment adviser as a "fiduciary", but this has been in the context of a holding that the adviser must, like a fiduciary, avoid conflicts of interest and must act in good faith (Securities and Exchange Commission v. Capital Gains

Research Bureau, Inc., 375 U.S. 180, 191, 194 (1963)), or that the adviser may not profit from the sale of his office (Rosenfeld v. Black, 445 F.2d 1337 (2d Cir., 1971)). This, of course, does not mean that an investment adviser is a fiduciary for all purposes, and I know of no case which so holds. Indeed, that the use of the term "fiduciary" is not dispositive is clearly indicated in Rosenfeld v. Black, supra, where the court said (445 F.2d at 1343):

> "While 'to say that a man is a fiduciary only begins analysis' ... we would see no reason why the 'well-established principle of equity' forbidding realization of profit for effecting the turn-over of corporate or other fiduciary office should not apply to the investment adviser of a mutual fund." (emphasis supplied)

Since, then, I am of the view that reasonableness and prudence under the existing circumstances is the appropriate test, and that any rule which goes beyond such a test and imposes liability without regard to good faith and the reasonableness of the action taken should not be extended beyond the areas to which existing authority applies it, I conclude that this aspect of the trustee rule should not be applied to investment advisers.

As already noted, however, the absence of authority could permit a court to take a contrary view, to apply the strict rule to investment advisers, and hold that Anchor's adequate investigation of, and keep under continuous review, the financial condition of Penn Central; that such an investigation and review would have revealed certain material adverse facts; and that Anchor failed to advise the Fund of the advisability of attempting to resell the paper.

The questions which these allegations raise are: (1) did Anchor's failure, under the circumstances, to make an independent investigation of Penn Central's financial condition after the purchase, and to maintain a continuous review thereafter, violate the standard of good faith, reasonableness and prudence enunciated above? (2) If so, would a reasonable and prudent adviser have concluded that an attempt to resell the paper should be made? (3) If so, when would such a conclusion have been reached, and would it have been possible at that time to resell the paper and, if so, how much could have been resold (i.e., to what extent was any inaction by Anchor the cause of the loss)?

These questions arise only if (as I believe should be the case) Anchor is found not liable for the purchase, i.e., only if Anchor is found to have acted reasonably and prudently in purchasing the paper. In this context, it is my opinion that it did not breach any duty to the Fund in not conducting a subsequent investigation or review.

If the initial purchase did not give rise to liability on Anchor's part because Anchor acted reasonably and prudently in relying on the combination of factors already described -- including the current credit analysis which it believed Goldman, Sachs had made and the short-term maturity of the paper -- I believe it was equally reasonable and prudent for Anchor to rely on those same factors in retaining the paper. A "prime" rating by the National Credit Office and a recommendation based upon a current analysis by Goldman, Sachs, which must have been made in the light of the maturity of the paper being offered, could have no meaning except that such short-term paper could safely be purchased and held to maturity. Furthermore, Goldman, Sachs was continuing to offer and sell substantial amounts of Penn Central paper during the first quarter of 1970, thus apparently indicating its own belief, presumably based upon continuing analysis, that such paper was safe.

Here, again, there is no available authority. It is, therefore, possible that a court could hold that, despite the absence of liability for the initial purchase, and particularly in view of the fact that the Penn Central paper had the maximum permissible maturity for commercial paper -- namely 270 days -- a reasonable and prudent investment adviser should have conducted its own review, or at least assured itself that Goldman, Sachs was in fact conducting a continuing review and found no cause for changing its favorable recommendation.

If a court were so to hold it would have to consider questions (2) and (3), above (p. 27). Likewise, if the court were to adopt the less stringent rule described above (p. 26), and hold that as a matter of law Anchor was required to make its own initial investigation and -- although not automatically liable for failure to do so -- is liable if such an investigation should have led it to refrain from making the purchase, the court could also determine that Anchor was required to conduct a continuing review and would have to consider the same two questions.

These questions would be questions of fact, to be decided by the trier of fact, be it court or jury. It is, of course, impossible for one to predict what such a trier of fact will find, particularly in complex circumstances. It must be noted, however, that the complaint in the derivative action alleges [¶ 28(f)] that after April 22, 1970 it had become "virtually impossible for Goldman, Sachs to resell Penn Central commercial paper as it became due." Thus, although the period during which the complaint alleges that a review should have been continued was November 28, 1969 to June 21, 1970 -- the date of the reorganization petition -- we are in fact dealing with a period ending no later than April 22, 1970, for it appears that whatever adverse information could have been ascertained thereafter could not have affected the result for the Fund.

The principal adverse information which investigation or review during this period would have disclosed seems clearly to be the substantial loss incurred for the first quarter of 1970, ended March 31, 1970. The report of this loss was released on April 21 but was not printed in the Wall Street Journal until April 23, 1970. Had Anchor determined at that time, because of the loss, to attempt to resell the Fund's Penn Central paper, it appears likely that it would not have been able to do so.

These circumstances, in my judgment, reduce the likelihood that the trier of fact will find that, had Anchor conducted its own review, it would have determined to resell the Penn Central paper at a time when this could have been done. Without such a finding, Anchor would not be liable for its failure to conduct a review.

Contractual Liability of Anchor

The Agreement for Investment Supervisory and Corporate Administrative Services between the Fund and Anchor, dated August 22, 1969, and in effect until May 1, 1970, contains the following provisions relating to Anchor's obligations to furnish investment advice and supervision:

> "FIRST: Anchor shall supervise the investment operations of the Fund and the composition of its portfolio, and, to the extent reasonably required in the conduct of the business of the Fund, Anchor shall furnish to the Fund from time to time advice and recommendations with respect to investments,

> investment policies, the purchase and sale of securities and the management of its resources. In the performance of this function, Anchor shall also from time to time furnish to the Fund such reports and information relating to industries, businesses, securities, monetary and other economic factors and conditions, and such other information and advice, as may be reasonably required by the Fund or as Anchor may deem to be helpful to the Fund."
>
> "SECOND: * * *"
>
> "THIRD: Anchor agrees to use its best efforts in the furnishing of investment supervisory and corporate administrative services hereunder, and shall at all times maintain a staff of officers and other trained personnel for the purpose of performing its obligations under this agreement. Anchor may, at its expense, employ other persons to furnish administrative services to the Fund or to furnish to Anchor statistical and other factual information, advice regarding economic factors and trends, information with regard to technical and scientific developments, and such other information and assistance as Anchor may desire."

In my opinion nothing in these provisions imposes on Anchor the duty to make its own independent investigation of the financial condition of Penn Central prior to its purchase of the Penn Central paper or while the Fund held such paper. On the contrary, I believe they impose on Anchor the duty to act in good faith, with the degree of skill and knowledge normally possessed by investment advisers. That the test is one of reasonableness under the circumstances is attested by the phrase "reasonably required" used twice in paragraph FIRST. And of equal importance, paragraph THIRD explicitly authorizes Anchor to employ persons not on its own staff to furnish factual information, advice concerning economic factors and trends, "and such other information and assistance as Anchor may desire"; this provision seems clearly to permit Anchor to rely on such information and assistance if it was reasonably prudent in selecting the person who rendered it.

For these reasons and the additional reasons discussed in connection with Anchor's common-law liability, it is my opinion that the Agreement does not impose upon Anchor any liability for the Penn Central loss.

Common-law Liability of the Fund Directors

The Fund is a Delaware corporation, and the duties and liabilities of its directors are therefore governed by Delaware law. Under Delaware law, as stated in Graham v. Allis-Chalmers Manufacturing Company, 188 A.2d 125, 130 (Del. 1963),

> ". . . directors of a corporation in managing the corporate affairs are bound to use that amount of care which ordinarily careful and prudent men would use in similar circumstances. Their duties are those of control, and whether or not by neglect they have made themselves liable for failure to exercise proper control depends on the circumstances and facts of the particular case.

* * *

> ". . .If he has recklessly reposed confidence in an obviously untrustworthy employee, has refused or neglected cavalierly to perform his duty as a director, or has ignored either willfully or through inattention obvious danger signs of employee wrongdoing the law will cast the burden of liability upon him." (emphasis supplied)

The rule stated in the Graham case applies to the directors of both a mutual fund corporation and an ordinary Delaware corporation. See Lutz v. Boas, 171 A.2d 381, 395 (Del. Ch. 1961).

The Delaware rule is similar to the statutory rule in New York and New Jersey, where a director is required to act "in good faith and with that degree of diligence, care and skill which ordinarily prudent men would exercise under similar circumstances in like positions." N.Y. Business Corporation Law, § 717; N.J. Business Corporation Act, § 14A:6-14.

While in theory the investment adviser of a mutual fund merely makes recommendations to the fund, which, acting through its officers and under the supervision of its directors, makes the actual decisions, in practice it is abundantly clear that all decisions on the purchase and sale of specific securities are necessarily made by the adviser, whose employees serve also as the officers and employees of the fund, and that the Board of Directors of the fund is necessarily limited to the "control" function referred to in the Graham case, above, that is, the review of and decisions on the basic investment policies, and general supervision of the procedures and performance of the adviser. This is substantially the same as the function of the Board of any ordinary business corporation, which could not and would not decide on the types of raw materials or machinery which the corporation purchases or the details of the design, production and marketing of its products, but rather is responsible for the selection, and review of the performance, of the management and for basic corporate policy. Clearly, under the rules stated above, a Board of Directors would not be held liable for losses caused by management actions taken in good faith and judged as reasonable under the circumstances. Similarly, the directors would not be held liable even for management actions which are subsequently viewed as negligent, provided the Board had no reason to suspect that management was not acting properly, and was not, and in the exercise of normal prudence could not be, aware in advance of the action to be taken.

Since it is my opinion that Anchor did not violate any duty to the Fund either in the purchase or in the retention of the Penn Central paper, it follows that the Fund directors violated no duty in connection therewith and, therefore, have no liability for the Penn Central loss.

Even if it were held that Anchor had a duty to make an independent investigation or review of Penn Central's financial condition, it is my opinion that under the principles of law applicable to directors, the Fund's directors would not be liable for the Penn Central loss. In the purchase of commercial paper for the Fund, Anchor had for about four years bought directly from the eight issuers on its approved list, and had commenced purchasing from dealers only shortly before the purchase of the Penn Central paper. There is no evidence that the Fund directors knew before the Penn Central purchase either that (i) a change in procedure had been made and that some dealer paper was being purchased or (ii) that Anchor was not making an independent investigation of the companies whose paper was being bought from dealers; furthermore, there is no clear evidence that it knew thereafter. According to the minutes of a Board meeting held on December 17, 1969, the purchase of commercial paper was discussed, but the nature of the discussion is not indicated. Kesselhaut thinks that he explained that dealer paper was being purchased, and may have discussed the procedure for purchasing dealer paper, but he is not certain, and Haire had no recollection on the subject. Under these circumstances it is an issue for the trier of fact to ascertain whether the Board knew, or should have known, even some time after the Penn Central purchases, that dealer paper was being purchased without an investigation and analysis by Anchor.

Furthermore, even if the Fund directors did know or should have known, it is my opinion that they did not violate their duties as directors by not requiring Anchor to undertake an immediate investigation or to attempt to resell the Penn Central paper. Since I believe that Anchor itself acted reasonably and prudently in purchasing and holding the Penn Central paper in reliance on the factors discussed above, and since there is no existing authority indicating that Anchor was required to make its own investigation and analysis, I believe the Fund directors would clearly have been warranted in accepting this procedure and I do not believe they could be found to have been negligent in doing so.

Section 13(a)(3) of the Investment Company Act of 1940

Section 13(a)(3) of the Investment Company Act of 1940 in part prohibits an investment company from deviating, without shareholder approval, from any policy it has deemed to be fundamental in its registration statement.

I understand that the original registration statement filed by the Fund stated as a fundamental policy that it would not "purchase" more than 10% of the securities of any one issuer. I have been informed that the registration statement has been amended on numerous occasions and that the precise content of the registration statement during 1969-1970 is not readily determinable. The original source of the 10% limitation was apparently a by-law provision which has since been replaced by a provision in the Fund's certificate of incorporation stating that the Fund may not "acquire or hold more than ten percent (10%) of the outstanding securities of any one issuer". Since it is likely that the registration statement is no more permissive than the Fund's charter document, I think it appropriate to assume that fundamental policy prohibits the retention, as well as the acquisition, of more than 10% of an issuer's securities. This is consistent with the Fund's prospectus (as revised September 2, 1969). It is clear that the application of the restriction is not limited to voting securities.

In my opinion this fundamental policy did not prohibit Anchor from continuing to hold $20,000,000 of Penn Central commercial paper at a time when the total amount of outstanding Penn Central commercial paper fell below $200,000,000. The restriction is expressed in terms of the "securities" of the issuer, not in terms of any "class of securities."

The issue is simply whether $20,000,000 of commercial paper constituted more than 10% of Penn Central's "securities". I believe that it manifestly did not. Commercial paper accounted for only a small fraction of Penn Central's securities. As of December 31, 1969, Penn Central's balance sheet showed debt securities of over $1,793,000,000; even if secured debt is excluded, total short-term debt and unsecured bank borrowings were over $500,000,000. These were, in my opinion, part of Penn Central's "securities," so that the Fund's holdings of commercial paper did not approach 10%.

Alternative Courses of Action

With the Fund's claim against Goldman, Sachs & Co. settled, the Fund must now determine the position which it will take in the Lasker derivative suit. In the present posture of that suit the Fund has three alternative courses of action:

1. As the party in whose interest the suit has been commenced, the Fund might seek realignment so as to become a plaintiff for the purpose of exercising control over and prosecuting the action.

2. The Fund might take the position that the action is sufficiently lacking in merit that it should not be prosecuted and should therefore be dismissed.

3. The Fund might take a neutral position, permitting the action to proceed for its benefit under the auspices of the present plaintiffs.

The first alternative would involve legal expense to the Fund, likely to be substantial, in pursuing a claim which, in my opinion expressed herein, should not be sustained. Further, it would probably require the Fund to terminate its advisory agreement with Anchor, since it might have a prejudicial effect upon a court or jury if the Fund were vigorously prosecuting a suit against Anchor while at the same time retaining it as adviser.

If the second alternative were adopted and the Fund were actively to seek dismissal of the suit, current court procedures would appear to require a hearing substantially on the merits. The cost to the Fund of such a proceeding, in which it would be seeking to defeat a very large claim on its behalf brought by its stockholders, might be substantial. Furthermore, to the extent that the Fund directors who are defendants in this suit were to incur legal expenses for their own counsel in connection with the proceedings, the Fund might be liable to indemnify such directors for these expenses to the extent not covered by any indemnity policy.

If the third alternative were adopted and the suit permitted to proceed without active participation by the Fund, the Fund might again be liable to indemnify its directors for their legal costs, unless they were held liable to the Fund for the Penn Central loss. This alternative would leave to the court the final determination of the difficult questions of fact and law involved, while retaining the possibility of a substantial recovery for the Fund.

It is for the Board of Directors of the Fund to determine, in the exercise of its discretion and business judgment, which alternative to adopt.

Very truly yours,

Stanley H. Fuld

Exhibit C to Affidavit of
Leon T. Kendall sworn to
January 23, 1975
Supplemental Report of
Stanley H Fuld to Board
of Directors of Fundamental
Investors, Inc. dated
December 18, 1974

STANLEY H. FULD
425 PARK AVENUE
NEW YORK, N.Y. 10022

December 18, 1974

PRIVILEGED AND CONFIDENTIAL

Board of Directors
of Fundamental Investors, Inc.
Westminster at Parker
Elizabeth, New Jersey

Dear Sirs:

This letter is intended to supplement my opinion, dated December 5, 1974.

First, I have been asked whether Goldman, Sachs & Co. agreed to repurchase all commercial paper which it sold to the Fund (including the Penn Central paper); if so, whether this was a legal and binding agreement and, if it was, why prompt legal action was not taken against Goldman, Sachs, based on the agreement.

As I pointed out in the opinion letter, Anchor required all issuers, from whom the Fund purchased commercial paper directly, to agree to repurchase it on demand, in order to provide liquidity - in order, in other words, to enable the Fund to convert paper into cash prior to maturity if the cash were unexpectedly needed. Clearly, a repurchase agreement by the issuer was not regarded as a guaranty, or safety factor, against bankruptcy of the issuer

I believe that Mr. Haire's establishment of a repurchase agreement as a condition of the purchase of dealer paper had the same purpose, and he and Mr. Kesselhaut have, in fact, stated that they looked upon it as a liquidity device rather than as a guaranty against loss. Indeed, it seems unlikely that they could have regarded the agreement as a guaranty against loss or as anything other than an undertaking to attempt to resell the paper to the issuer or others if the Fund so wished.

Accordingly, it appears clear that there was not - and that Anchor did not believe there was - any legal, binding agreement by Goldman, Sachs to repurchase the Penn Central paper. That being so, the Fund was warranted in not basing its suit against Goldman, Sachs upon such an agreement. I would merely add that, when Goldman, Sachs declined to repurchase the paper, it appears that Anchor sought unsuccessfully to have it repurchased by Penn Central, and that by then there had ceased to be any market for Penn Central paper.

Second, I have been asked to discuss more fully the rules relating to a possible position by the Fund's directors that prosecution of the derivative action is not in the Fund's best interests and that, consequently, the suit be dismissed.

The law is clear that the mere fact that a corporation has a supportable claim does not mean that the corporation must assert the claim in a lawsuit. As the Supreme Court (per Brandeis, J.) wrote in United Copper Securities Co. v. Amalgamated Copper Co., 244 U.S. 261, 263 (1917), whether the corporation should "seek to enforce in the courts a cause of action for damages is, like other business questions, ordinarily a matter of internal management and is left to the discretion of the directors...." See, also, Swanson v. Traer, 249 F.2d 854 (7th Cir. 1957); Ash v. International Business Machines, Inc., 353 F.2d 491 (3rd Cir. 1965); 13 Fletcher, Cyc. Corp., § 5822, p. 131. The same rule should, presumably, apply to a determination by the directors that an action commenced on behalf of the corporation by a stockholder should not proceed.

The law is not clear, however, on the extent to which a court will review the determination of the directors in such a case.

Language in some of the decisions indicates that the court should be concerned solely with the honesty and good faith of the Board's determination. Thus, in the Ash case, 353 F.2d 491, supra, the Court of Appeals for the Third Circuit declared (at 493):

> "The Supreme Court and, following it, the Courts of Appeals have repeatedly stated and applied the doctrine that a stockholder's derivative action, whether involving corporate refusal to bring antitrust suits or some other controversial decision concerning the conduct of corporate affairs, can be maintained only if the stockholder shall allege and prove that the directors of the corporation are personally involved or interested in the alleged wrongdoing in a way calculated to impair their exercise of business judgment on behalf of the corporation, or that their refusal to sue reflects bad faith or breach of trust in some other way. [Cases cited.] Prevailing doctrine in the state courts is to the same effect."

On the other hand, there are cases which suggest that more is required, that the directors must, as they are required to do generally, exercise ordinary prudence or diligence, that there must be some reasonable basis for the decision reached. For example, in Levine v. Behn, 174 Misc. 988 (Sup. Ct. N.Y. 1940), aff'd, 262 A.D. 729 (1941) - a case in which a derivative suit was brought against directors for paying rather than contesting a claim - the court wrote (174 Misc. at 991-2):

> "The test in each case, however, is the same, viz., whether or not the directors acted honestly and diligently and with a view to the promotion of the interests of the corporation. Of course, neither actual good faith nor advice of counsel will save

> directors if the facts afford no reasonable basis for a belief that a payment is for the best interests of the corporation. Honest belief without any basis in fact must be attributable to negligence."

And in Perrine v. Pennroad Corporation, 47 A. 2d 479 (Sup. Ct. Del. 1946) - a case involving the settlement of a lawsuit - the high court of Delaware declared (at 489):

> "Good faith may always be brought in question where it appears that the settlement of a dispute between stockholders of a corporation is so grossly inadequate that one is required to reach the decision that the directors were reckless and indifferent as to the rights of the stockholders and did not exercise reasonable business judgment."

In considering the subject before us, a word should be said of Rule 23.1 of the Federal Rules of Civil Procedure which provides, in part, that a derivative suit may not be "compromised" or "dismissed" without approval of the court. Although dismissal of the Lasker derivative action falls within the literal language of the Rule, it has been suggested that it does not apply to an involuntary dismissal. (Wright and Miller, 7A Federal Practice and Procedure, § 1839, p. 436.) However, since there are certain parallels between the two situations, I call your attention to the recent Second Circuit decision in City of Detroit v. Grinnel Corporation, 495 F.2d 448 (1974), which describes the court's role when approval of a settlement is sought (at 462):

> "When a District Court exercises its authority in approving a settlement offer, it must give comprehensive consideration to all relevant factors and yet the settlement hearing must not be turned into a trial or a rehearsal of the trial. [Case cited.] The Court must eschew any rubber stamp approval in favor of an independent evaluation, yet, at the same time, it must stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case."

If it were to appear to the Fund's nonaffiliated directors that the Fund's interests would be adversely affected by allowing the Lasker suit to continue to trial and decision and that it would be in the Fund's best interests to forego any possible recovery and have the suit dismissed, the directors could, of course, take those matters into account. And, if the directors were to conclude that reasons were presented which were persuasive and sufficient, they could then decide to seek dismissal. If this were done, the scope of review would be determined by the court in the light of the rules discussed above.

In short, it is my view that, at a minimum, the court would review the reasons for seeking dismissal and might consider, at least to some degree, the underlying merits of the derivative action. Whether reasons can be adduced, with supporting facts, sufficient to persuade the nonaffiliated directors to seek dismissal, and sufficient to persuade the court that a proper basis exists for the directors' action, must await a presentation to the directors.

Very truly yours,

Stanley H Fuld

Exhibit D to Affidavit of Leon T. Kendall sworn to January 23,1975
Minutes of meeting of Board of Directors of Fundamental Investors, Inc.
dated December 18,1974

FUNDAMENTAL INVESTORS, INC.

MINUTES OF MEETING OF BOARD OF DIRECTORS

December 18, 1974

A special meeting of the Board of Directors of Fundamental Investors, Inc. was held on December 18, 1974 at the office of the Fund, Westminster at Parker, Elizabeth, New Jersey. The special meeting convened at 2:30 p.m. There were present:

Leon T. Kendall
Louis F. Laun
Mary S. O'Connor
Beryl Robichaud
William J. Stephens

constituting a quorum of the Board of Directors of the Fund for the special meeting. Mr. Leon T. Kendall was appointed by the Board of Directors as Chairman of the special meeting. The Board agreed on the procedure to be followed at the special meeting.

The following persons were invited to join the meeting at 3:10 p.m. for the purpose of responding to questions of the five directors: Hon. Stanley H. Fuld, Special Counsel to the Fund, John R. Haire, Chairman and Chief Executive Officer of Anchor Corporation, Donald M. Kemmerer and Charles F. Phillips, directors of the Fund, and Eugene P. Souther, Esq., counsel to the Fund.

Mr. Kendall presided and Mr. Souther acted as Secretary of the meeting.

The special meeting was held to consider further the Fund's holding of commercial paper of Penn Central Transportation Company ("Penn Central") and also what further action, if any, the Fund should take with respect to the action entitled Lasker, et al. v. Harry G. Burks, Jr., et al. in the United States District Court for the Southern District of New York allegedly brought on behalf of the Fund by two individual shareholders of the Fund against Anchor Corporation and those directors who were members of the Board of Directors of the Fund at the time of the purchase of the Penn Central commercial paper.

Mr. Kendall called upon Special Counsel, former Chief Judge Fuld, who reported on the status of the Lasker action, described the claims made in that action and expressed his opinion as to the merits of each of those claims. Judge Fuld then discussed the alternatives available to the Board and the standards it should apply in deciding what course of action to pursue, stressing that Messrs. Kendall, Laun, Stephens and Mrs. O'Connor and Dr. Robichaud should act independently of the remaining members of the Board in deciding what in their business judgment exercised in good faith was in the best interests of the Fund.

Judge Fuld advised that the Fund had three alternatives:

1. Seek to realign itself as a party plaintiff in the action and take control of the prosecution of the action;

2. Instruct its counsel to seek to dismiss the action on the grounds that it was not in the best interests of the Fund to pursue it; or

3. Remain neutral in the role of a nominal party defendant and allow the action to proceed as directed by the shareholders who instituted the action.

Judge Fuld then summarized the analysis of the facts and law and the opinions as to the merits of the causes of action alleged in the complaint that he had set forth for the Board in his letters to the Board of December 5, 1974 and December 18, 1974.

Because he had concluded that there was no violation by Anchor or by the Fund directors of any provision of statute or of any common law or contractual obligation to the Fund, Judge Fuld advised against adopting the first alternative.

As to the second alternative, Judge Fuld counselled that the Board could conclude that there was no basis for the action and that its continuance would be damaging to the Fund. Such a decision would have to be made independently, in good faith and through the sound exercise of business judgment as to what action was in the best interest of the Fund. Should the Board conclude that it was not in the best interest of the

Fund's shareholders or of the Fund for the action to continue, it could then instruct its counsel to move to dismiss the action.

The third alternative would leave the Fund in the role of a nominal party defendant taking no active part in the litigation but allowing the action to proceed against Anchor Corporation and the named directors of the Fund. In deciding whether to follow that course, Judge Fuld advised, among other things, that the Board could consider what effect the continued prosecution of the action could have on the Fund. There might result serious distraction of Anchor Corporation from its duties as adviser to the Fund caused by the preparation for and defense of the action. Anchor's ability to attract and retain qualified personnel under the circumstances might be affected. Any ultimate recovery might not be worth the serious impact on the Fund of the prosecution of such an action to a conclusion.

The directors then questioned Judge Fuld at length concerning the facts and the law and his opinion as to the merits of the claims made and the chances of success on them. During that discussion Judge Fuld amplified on the contents of his letters to the Board.

The Chairman then called upon Mr. Souther, who discussed the practical implications of following each of the alternatives available to the Fund and the nature and extent of the proceedings each alternative would entail. Mr. Souther advised the Board that it could consider the possibility that as a result of retention by the Fund of a 73.75% interest in the notes under its settlement with Goldman, Sachs, the Fund might recover some additional amount in the reorganization of Penn Central. He also described the discovery proceedings and trial preparation that could be anticipated if the action were to continue and the type of work interruption that activity could entail, which might well have an adverse effect on the Fund's shareholders. Mr. Souther pointed out that there could be a substantial cost to the Fund for attorneys' fees for its counsel as well as for outside directors who were found not to be liable to the Fund. Finally, he told them that they could properly consider not only the chances of securing a substantial judgment against Anchor Corporation and possibly the director defendants, but also the practical possibility of collecting such a judgment. Mr. Souther reiterated that it was up to the five above-named members constituting the Board for the purpose of making this decision to act independently and in good faith and to exercise their sound business judgment in deciding which alternative to follow.

The Board then sought the views of Special Counsel and counsel as to whether the Fund's earlier decision to settle its case against Goldman, Sachs and the subsequent jury award for the full amount of their claim for plaintiffs in the Welch action against Goldman, Sachs compelled the

Board to continue the *Lasker* action. Mr. Souther pointed out his understanding that the facts in the Fund's action against Goldman, Sachs and those in the *Welch* action were different in at least three significant respects: (1) plaintiffs in the *Welch* action had purchased the commercial paper some time after the Fund's purchases, at a time when Goldman, Sachs knew even more about the serious financial condition of Penn Central; (2) the Fund might have been held to a higher standard of inquiry than plaintiffs in the *Welch* action on the theory that it was a sophisticated investor; and (3) amount of the Fund's claim against Goldman, Sachs ($20,000,000 plus interest) was so large that a jury might be reluctant to award such a judgment against Goldman, Sachs whereas the claim of the three plaintiffs together in the *Welch* action was only for $3,000,000 plus interest.

The Board then addressed a substantial number of questions to Mr. Haire concerning the procedure followed by Anchor Corporation in 1969 in purchasing commercial paper in general and of Penn Central in particular. In response to the questions of the Board, Mr. Haire discussed, among other things, his belief that at the time of purchase Goldman, Sachs had agreed to repurchase the paper at any time; that in the course of the action against Goldman, Sachs the Fund had learned that during the period from February 1, 1968 through June 21, 1970

Goldman, Sachs had repurchased commercial paper of various issuers some 1200 times, including approximately 40 repurchases of commercial paper of Penn Central up to May 1, 1970, and had repurchased from the Fund commercial paper of Chrysler Corporation and other issuers; that Anchor had established guidelines for the purchase of commercial paper as follows:

(a) that it be rated "prime" by the National Credit office;

(b) that not more than 10% of the outstanding commercial paper of any issuer should be purchased; and

(c) that the dealer should agree to repurchase the paper at the Fund's request.

Moreover, Goldman, Sachs had assured the Fund that it had made a thorough credit investigation of Penn Central.

It was not until the filing of the petition for reorganization by Penn Central that Goldman, Sachs asserted that it was not legally obligated to repurchase the commercial paper. Mr. Haire stated his belief that the guidelines had been followed in making the purchase and explained that he and those who had participated in the purchase had assumed, based on his understanding of the general practice, that

Goldman, Sachs had an agreement with Penn Central which in turn had an agreement with its bankers that would insure that the paper would be bought back promptly at the request of the Fund.

The Board then inquired into the extent of the information made available to the Board at the time of the purchase of the Penn Central commercial paper. Mr. Phillips and Mr. Kemmerer participated in that discussion along with Mr. Haire. Mr. Haire explained that due to the short-term nature of commercial paper investments the specific purchases were not identified in the monthly reports made to the Board, but instead all short-term investments were combined and identified as such. Information as to specific holdings at any time was available from the treasurer. In addition, a presentation with respect to commercial paper had been made to the Board on December 17, 1969.

Mr. Haire explained that it had been considered sufficiently prudent to include commercial paper under the description "short-term investments" because at that time commercial paper was considered to be the equivalent of cash (Judge Fuld read from the report of the staff of the Securities and Exchange Commission following its investigation of Penn Central which observed that the financial community at that time considered commercial paper to be the equivalent of cash) and because the investment in commercial paper normally was of such a short duration that it would not be picked up in a monthly report. Mr. Haire pointed out that the financial community at the time considered Penn Central -- a company with assets of $7 billion -- to be a sound investment as is shown by the number of sophisticated investors who purchased its commercial paper after the Fund's purchases. In response to questions, Mr. Haire stated that he believed that Anchor Corporation had followed procedures which were prudent in light of the prevailing view of the safety of commercial paper in general and of the soundness of the investment in Penn Central and that to his knowledge the normal procedure followed by other mutual funds was to lump short-term investments and not to identify them specifically in published reports.

The directors asked for an identification of those who had purchased Penn Central paper subsequent to the purchases by the Fund and those who still held that paper at the time the reorganization petition was filed. Mr. Haire undertook to try to supply such information to the Board as soon as possible and gave the Board an interim list of the banks that had purchased Penn Central Commercial paper after the Fund's purchases and a list, which he could not assure was complete, of the holders of Penn Central Commercial paper as of June 21, 1970, the day the reorganization petition was filed. Copies of those lists are annexed to the minutes of this meeting.

In response to questions, Mr. Haire reported that it was not unusual in 1969 for mutual funds to invest in commercial paper and that the Penn Central investment had been attractive to the Fund's advisers in the fall of 1969 because of an anticipated fall off in interest rates, which did occur, which made it appear advantageous to secure an investment paying an interest rate as high as 9%.

In response to questions, Mr. Haire reported that on learning in the latter part of May of an article in Barron's expressing some concern about the safety of commercial paper, the Fund had asked Goldman, Sachs to repurchase $10 million of the commercial paper. Goldman, Sachs did not refuse, but, in effect, put off the repurchase with the assurance that it was processing the request. Thereafter, Goldman, Sachs suggested that the Fund ask Penn Central to repurchase the commercial paper. Again, instead of outright refusal the Fund was met with what in effect was a delaying tactic. Goldman, Sachs finally refused to repurchase the Penn Central commercial paper.

The Board then discussed the standard to be applied to Anchor Corporation in determining the degree of care it should have exercised. Judge Fuld referred to the discussion of that subject contained in his letter of December 5 and expressed his opinion that even if Anchor Corporation were to be held to a higher standard as a sophisticated investor, he believed that it met that standard by establishing and following its guidelines. Mr. Haire added that in addition to relying on Goldman, Sachs, those charged with making investment decisions had considered the purchase, they knew Penn Central since it was a recent equity holding of the Fund, and they raised no objection to the purchase of the Penn Central commercial paper.

Mr. Kemmerer and Mr. Phillips were excused from the meeting at this point.

The Board then discussed the question of the impact on Anchor Corporation and on the Fund's shareholders of the Lasker action being pursued either by the Fund or by the shareholders who brought the action. The price paid for the notes was slightly more than $18.5 million. Considering the cash settlement received from Goldman, Sachs and ignoring any possible recovery on the Fund's remaining 73.75% interest in notes, a judgment, if obtained, could possibly amount to $15 million. There being approximately 100 million Fund shares outstanding, if there were a recovery of a judgment of $15 million it could result in a recovery of no more than 15¢ per share; however, the extent of such recovery would be diminished by the fees payable out of that recovery to attorneys for plaintiffs in the

Lasker action, fees for counsel for the Fund and, possibly, fees for counsel for Fund directors found not to be liable to the Fund. It was estimated that the attorneys for plaintiffs in the Lasker action, if successful, might ask the court to award them fees ranging from 15-30% of the judgment.

Concerning conduct of the action should it continue, Mr. Haire explained that regardless of the lack of merit of the action and of his belief that there was slight chance of success by plaintiffs, Anchor would, of course, be required to defend the action to the fullest, which would necessarily present substantial distraction to Anchor. In addition, he questioned the ability of Anchor to attract and retain the highly qualified personnel they want and need if such an action were being pursued with the acquiescence, if not under the control, of the Fund.

The Board then considered the question whether, if there were a judgment for the full amount, it could be collected. Mr. Haire reported that Anchor Corporation's current net worth is approximately $12 million, a sum less than the amount of a possible judgment. Washington National Corporation, of which Anchor Corporation is a wholly-owned subsidiary, is not a party to the action and Mr. Haire could not represent to the Board whether Washington National Corporation would assist Anchor Corporation in making up any differential should a judgment be entered larger than Anchor Corporation was able at that time to pay. In response to a question, Mr. Haire reported that Anchor

Corporation's gross management fees in 1974 were expected to be $4.1 million and were estimated to be $3.8 million in 1975.

Mr. Haire was then excused from the meeting.

The Board then conducted further discussion with Special Counsel and reviewed the subjects which had been discussed earlier. Judge Fuld reiterated the criteria to be followed by the Board in reaching its conclusion and advised that in assessing the decision to be taken by the Board a court would consider its independence, its honesty and its good faith in reaching whatever business judgment it reached.

The Chairman then excused Special Counsel and counsel who left the meeting and the Board continued its discussions.

The Board members in executive session expressed a desire to review again the various documents pertaining to the situation and agreed to communicate to the Chairman any further questions or points of information desired. It was agreed that the Chairman would contact each member individually as to the next step for the committee to take.

The Board adjourned at approximately 6:00 p.m.

Eugene P. Southa
Secretary

Leon T. Ordall
Chairman

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EXHIBITS TO MINUTES OF DECEMBER 18, 1974
SPECIAL MEETING OF BOARD OF DIRECTORS

BANKS

Manufacturers Hanover Trust
First National Bank
State Street Bank and Trust
National Bank of Wyandotte
National Sawmut Bank
Mellon National Bank and Trust Co.
Chemical Bank
Fairfield National Bank
Central National Bank and Trust
Security National Bank
Bank of Lyons
First National Bank of Tulsa
Fort Wayne National Bank
Bankers Trust Co.
City National Bank
Citizens Bank
Brown Bros. Harriman & Co.
Seattle First National Bank
First National Bank of Atlanta
Provident National Bank
Peoples Bank and Trust Co.
Security Pacific National Bank
First National Bank of Boston
Fort Worth National
Valley Bank and Trust Co.
Amoskeag National Bank
First National Bank of Elkhart
Northern Trust Co. of Chicago
First National Bank of Chicago
First and Merchants National Bank
National Boulevard Bank
Louisiana Bank and Trust Co.
The Fidelity Bank
Detroit Bank and Trust Co.
Marine Midland Grace Trust Co.
Worcester County National Bank
Wells Fargo Bank
First National Bank of Orlando
State National Bank
Philadelphia National Bank
Des Plaines Trust & Savings Bank of Chicago
United California Bank
Calumet National Bank
Webster Groves Trust Co.
First Security National Bank and Trust
Third National Bank of Hampden
First Wisconsin National Bank
American National Bank and Trust
National Bank of North America
Wachovia Bank and Trust Co.
Equitable Trust Co.
U. S. Trust Company
Bank of New York
Farmers Savings Bank
City Bank and Trust Co.
Old National Bank
North Carolina National Bank
First National Bank of Arizona
National Bank of Commerce
Union Bank
Garfield Ridge Trust & Savings Bank
Essex City Bank and Trust
Merchants National Bank
Palmer-American National Bank
Cleveland Trust Co.
Union Planters National Bank
Trade Bank and Trust Co.
Valley National Bank
Franklin Savings Bank
Chittenden Trust Co.
First National Bank of Passaic
Marshall & Isley Bank
Commercial National Bank

Holders of Penn Central Commercial Paper as of June 21, 1970

1. Archdiocese of Tucson (through Valley Bank)
2. United Conference of Catholic Bishops (through First National Bank of Chicago)
3. Pratt Institute (through Auchincloss & Lawrence and U. S. Trust Co.)
4. Good Hope Corporation (through Auchincloss & Lawrence and U. S. Trust Co.)
5. American Express Company
6. Amercian Automobile Insurance Company
7. Getty Oil Company
8. Olympia Brewing Corporation
9. Welch Foods, Inc.
10. C. R. Anthony Co.
11. Younkers Bros.
12. University of Southern California (through United California Bank)
13. L. E. Dixon Co. (through United California Bank)
14. Society for Ruptured and Cripple (through U. S. Trust Co.)
15. Greenwood Mills (through Mfrs. Hanover Bank & Trust Co.)
16. Glen Oaks Club (through Trade Bank)
17. A. C. Monk & Co.
18. Carnegie-Mellon University
19. University of Kentucky
20. Muhlenberg College
21. University-Hill Foundation

Mallinkrodt Co.

Niagara Permanent Savings & Loan

College Life Insurance Company of Indiana

Homestake Mining Co.

Granite City Steel

Norton Simon Corp.

U. S. Steel Pension Fund

~~May Department Stores~~

Marshall & Isley Bank

Royal Bank of Canada

Ames Brothers

Prentice-Hall & Subsidiaries Profit-Sharing Plan

W. R. Grace & Co.

Hawaiian Cement

First Bank of Brownsville, Texas

Exhibit E to Affidavit of
Leon T. Kendall sworn to
January 23,1975. Letter from
William J. Stephens to Leon
T. Kendall, dated December 31,1974.

WILLIAM J. STEPHENS
21 LIVE OAK ROAD
HILTON HEAD ISLAND, SOUTH CAROLINA 29928

December 31, 1974

Re: The Derivative Action
Lasker et al
February 1973

Dear Leon,

At this date I wish to advise that my tentative conclusion is that in the best overall interest of Fundamental Investors, Inc., this derivative action should not be prosecuted and should therefore be dismissed.

I have given consideration to the following:

#1 - Judge Stanley H. Fuld's statement contained in his letter of December 5, 1974 which reads - "As a result of my analysis of the facts and the law, it is my opinion that there was no violation by Anchor or by the Fund directors of any provision of statute or of any common law or contractual obligation to the Fund, in connection with the acquisition and retention of the Penn Central commercial paper."

#2 - There is no hard evidence that the adviser did not exercise due care and diligence in the Penn Central transaction. The certain guidelines established for the purchase of commercial paper from dealers are evidence that this transaction was not entered into lightly. It is reasonable to conclude the guidelines were truly a sufficient safeguard.

#3 - It is also reasonable for the adviser to place reliance on the presentation and recommendation of Goldman, Sachs & Co., a most astute, prestigious and highly regarded investment banker.

#4 - As a purchaser, Anchor was in "first class" company and this conclusion was arrived at by an examination of the "Investor Sales Analysis" from 3/1/68 to 4/2/70, a 12 page document prepared by Goldman, Sachs & Co. Also examined was the list of 73 banks that bought and/or sold Penn Central paper, mostly for the account of customers. It seems evident that the investment community highly regarded the Penn Central commercial paper and purchased it as late as 4/2/70. The statement showed sales of $172,505,000 in this period, not including the $20,000,000 purchased by Anchor. The amount not paid at maturity was $52,205,000 including the $20,000,000 Anchor buy.

#5 - Commercial Paper was fully accepted by the investment community. The outstanding commercial paper in the first part of 1970 exceeded $40 billion.

(continued)

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12/31/74
Mr. Leon T. Kendall

#6 - In August 1968 the Interstate Commerce Commission gave Penn Central authority to sell $35 million in commercial paper. On December 17, 1968 the I. C. C. increased the authorization to $100 million. On May 18, 1969 Penn Central announced an increase to $150 million, approved by the I. C. C. On October 29, 1969 the I. C. C. agreed to permit the sale of up to $200 million. At this time the comment on the decision by the I. C. C. to increase to $200 million was, "On the whole, applicant is in a strong financial condition."

#7 - Penn Central had a $50 million revolving credit plan. In April 1969, with First National City as the lead bank, the amount of the revolving credit was increased to $300 million. All $300 million was used by the railroad, which eventually defaulted on the loan. There were about ninety banks involved; the majors were First National City $35 million, Irving Trust and Morgan Guaranty $25 million each, Manufacturers Hanover $20 million, with Bankers Trust of New York, Chemical Bank New York Trust, First National Bank of Chicago and Continental Illinois Bank at $15 million each. It is clear the banks did not contemplate that the railroad would be bankrupt within 14 months!

#8 - Of more than passing interest is the interlocks of Penn Central directors with the major banks of Penn Central and the railroads indebtedness to these banks as of May 12, 1970.

Director	Bank	Amount
S. Saunders	Chase Manhattan	$7,832,500
	First Pennsylvania	18,004,766
D. Beran	Provident National	57,074,895
P. Gorman	Bankers Trust	26,063,106
J. T. Dorrance, Jr.	Morgan Guaranty	90,972,957
A. E. Perlman	Marine Midland	1,083,651
R. S. Rauch, Jr.	Girard Trust	49,408,188
R. G. Rincliffe	Philadelphia National	12,480,000
	Total	$262,920,063

On June 8, 1970 International Utilities was the largest shareholder of Penn Central with 500,000 shares. They were in the midst of taking a loss of $8 million on their holdings. John Seabrook was Chairman of International Utilities and a Director of Penn Central.

(continued)

Also it is to be noted that the total railroad indebtedness to First National City was more than $300 million. They were not represented on the Board of Penn Central.

My only comment on this is the observation that the Directors did not know or understand the "soft under belly" of the railroad until it was too late. Question? - If the Directors did not grasp the real financial posture of Penn Central, was it possible for Anchor to reach behind the scenes and get the true picture?

#9 - On merger day February 1, 1968 Penn Central had assets of $6.5/7.0 billion. In just 871 days later, on June 21, 1970, bankruptcy proceedings were filed under Section 77. Penn Central was regarded as the backbone of the country's transportation system and had a "Rock of Gibraltor" stature. "Nothing can happen to Penn Central" was accepted in financial centers across the nation. "The banks are behind Penn Central," was regarded as Gospel.

#10 - In part, my conclusion that the Lasker derivative action should not be prosecuted stems from my concern about the possible impact on Anchor and Fundamental Investors, Inc.

First, as to Anchor:
The amount involved exceeds the total assets of Anchor and, if the award was made Anchor would cease to be a viable organization. Their ability to attract and retain skilled fund managers would be gone. It would indicate that the Fund Board believed Anchor had violated the law and breached their contractural obligations to the Fund. I do not so believe. It would be inconsistent to retain Anchor as the Fund adviser and join in a suit against them at the same time. Would the Fund flounder in the interim of changing advisers? I fear so.

Second, as to the Fund:
The impact on the Fund, as a result of public knowledge that the Board had become a plaintiff in prosecuting Anchor would probably result in heavy redemptions. This would compel distress selling of the Portfolio in the current depressed market. As of November 30, 1974, Total Net Assets were $531 million, Short Term investments $21 million, Cash and Receivables $15 million. Net Asset Value per share was $5.13. Recovery of the total amount

(continued)

represents about $.13 a share which is 2½%. The Net Asset Value of the shares, I believe, would be damaged by a far greater percentage if the Board supported the suit. I do not make light of the sum involved but wanted to put it into perspective.

#11 - It is my tentative business judgment that the Lasker suit is without merit and that it would not prevail.

SUMMARY

These are my thoughts at this time. I will await answers to some questions that other Directors and I have asked before coming to a final conclusion.

Respectfully submitted

William J Stephens

William J. Stephens

wjs/hl

Mr. Leon T. Kendall
7125 N. Barnett Lane
Fox Point
Wisconsin 53217

Mr. Leon T. Kendall
Mortgage Guaranty Ins. Co.
MGIC Plaza
Milwaukee, Wisconsin 53201

Mr. Louis F. Laun
Mrs. Mary S. O'Connor
Dr. Beryl Robichaud

Exhibit F to Affidavit of Leon T Kendall sworn to January 23,1975. Minutes of meeting of the Board of Directors of Fundamental Investors, Inc. dated January 6,1975

FUNDAMENTAL INVESTORS, INC.

MINUTES OF MEETING OF BOARD OF DIRECTORS

January 6, 1975

A special meeting of the Board of Directors of Fundamental Investors, Inc. was held on January 6, 1975 at the New York Yacht Club, 37 West 44th Street, New York, New York. After discussion commencing at 6:00 p.m., the special meeting convened at 7:30 p.m. There were present:

Leon T. Kendall
Louis F. Laun
Beryl Robichaud
William J. Stephens

constituting a quorum of the Board of Directors. In accordance with the decision reached at the special meeting held December 18, 1974, Mr. Kendall served as Chairman. Also present at the request of the Board of Directors to act as Secretary of the meeting was Eugene P. Souther, Esq., counsel to the Fund.

The special meeting was held to consider further the subjects discussed at the special meeting of December 18, 1974, and to decide what action the Fund should take with respect to the Lasker action.

The directors first reviewed and approved the minutes of the December 18, 1974 special meeting. The directors confirmed that none of them had been in contact with anyone affiliated with Anchor Corporation since the December 18, 1974 special meeting.

Mr. Kendall reported to the Board that Mary S. O'Connor was out of the country, but that he had discussed with her at length the subjects to be covered at the meeting, knew her position on these subjects and had her instructions as to how to cast her vote.

Mr. Kendall reported to the Board that since the December 18, 1974 special meeting he had spoken with each of the other four designated directors concerning the position the Fund should take with respect to the Lasker action, and had received from them the additional questions they had on the matter. He reported that he had relayed those questions to special counsel and counsel, and that he had personally spoken with Judge Fuld about the alternatives available to the Fund, and also about the nature and extent of the hearing that might be conducted if the Board of Directors decided to direct counsel to move to dismiss the action.

In response to certain of the questions Mr. Kendall had relayed to counsel from members of the Board, Mr. Souther supplied (1) a detailed biographical sketch of the background and qualifications of Judge Fuld to supplement the information the Board had previously been given," (2) a memorandum outlining the necessary procedures and possible problems which might arise if the Board decided to terminate the advisory agreement between the Fund and Anchor Corporation, and (3) documents with respect to the guidelines now followed by Anchor Corporation concerning short-term investments, including commercial paper. Mr. Souther also reported: that Judge Fuld had never had any prior business connection with Anchor Corporation or anyone affiliated with it; that a computer print-out produced by Goldman, Sachs in the Welch action confirmed the identity of other institutional investors that had purchased six to nine month commercial paper of Penn Central; and that the approximate date of the failure of Mill Factors to repurchase commercial paper it had issued was in the spring of [illegible]9.

The Board again reviewed the circumstances of the purchase of the Penn Central commercial paper by the Fund and the repeated and unsuccessful efforts made by the officers of the Fund to have Goldman, Sachs, and thereafter Penn Central, repurchase the commercial paper.

Mr. Kendall reported on his conversation with Judge Fuld covering the probable legal procedures and costs to the Fund directors and shareholders. He also reiterated Judge Fuld's thinking on the various alternatives.

The Board of Directors then discussed each of the three alternatives available. As to the first alternative, i.e., that the Fund seek to realign itself as party plaintiff in the Lasker action for the purpose of exercising control over and prosecuting the action, the Board of Directors discussed, among other things, that to do so they would have to (1) determine that they disagreed with Judge Fuld's considered opinion that the directors should not adopt the first alternative because of the lack of merit to the action, (2) conclude that Anchor Corporation and the defendant directors, unaffiliated and affiliated, had violated the law and that Anchor Corporation had breached its contract with the Fund, and (3) decide that the prosecution of the action was in the best interests of the present shareholders of the Fund. The Board expressed its belief that pursuit of the first alternative would necessarily cause the Fund to seek to obtain a different investment adviser immediately, with inevitable serious disruption and damage to the shareholders of the Fund. The Board then considered the potentially disastrous effect on the Fund shareholders such a decision might have and compared it to the remote chance of collecting what would amount at most to between 10¢ and 13¢ per share (prior to counsel fees and expenses) or about 2% of the net asset value of the Fund.

The Board of Directors then agreed unanimously that the Fund should not pursue the first alternative set forth in Judge Fuld's December 5, 1974 memorandum, with Mr. Kendall reporting that Mrs. O'Connor was also against pursuing this alternative.

Concerning the third alternative set forth, i.e., the possibility of taking no position and permitting the action to proceed under the control of the two present plaintiff shareholders, the Board of Directors discussed (1) the distraction and business interruption to Anchor adopting that alternative would present and the possible serious consequences to the shareholders of the Fund that could be expected to follow, (2) Judge Fuld's opinion that Anchor and the defendant directors had not violated the law and were not liable to the Fund, (3) the serious risk of injury to the shareholders from allowing the action to continue weighed against the small percentage per share net recovery which could be expected if there were a judgment in favor of the Fund, and (4) the possibility that the Fund might incur substantial attorneys' fees were the Lasker action to continue.

Mr. Kendall and the other directors then discussed in detail Mr. Stephens' letter to him and the other three directors, dated December 31, 1974, in which Mr. Stephens tentatively concluded, on the basis of the 11 detailed considerations he set forth, that the Fund should seek to dismiss the Lasker action because of his belief and business judgment that its prosecution was not in the best interests of the shareholders of the Fund. The discussion also covered a broad range of subjects centered on the anticipated effect on the shareholders of the Fund and the Fund if the action were to continue. The directors were concerned, among other things, that there might be immediate and sizeable redemptions of Fund shares, distraction of the adviser from its duties, loss of employees and inability to attract new ones, loss of interest in the Fund by brokers and dealers, a question as to the continuing ability to sell shares of the Fund and possible eventual loss of the distribution network for shares of the Fund.

Mr. Kendall then reported to the directors on his lengthy discussion with Mrs. O'Connor on December 22, 1974. She had thoroughly reviewed Judge Fuld's memoranda of December 5 and December 18, 1974, Mr. Stephens' letter of December 11, and other material. Mrs. O'Connor had concluded that, for the reasons discussed by the other directors, as set forth above, the Fund should pursue the second alternative in Judge Fuld's December 5 memorandum and should seek to dismiss the Lasker action because it is not in the interests of the shareholders or the Fund that the action proceed.

On motion of Mr. Laun, seconded by Dr. Robichaud, the Board of Directors then unanimously adopted the following resolution:

> RESOLVED, that the law firm of Seward & Kissel, counsel to the Fund, be directed to take the action necessary to have the complaint dismissed in the action in the United States District Court for the Southern District of New York, entitled Howard M. Lasker, et al. v. Harry G. Burks, Jr., et al.

The Board adjourned at approximately 10:15 p.m.

Eugene P. Souther
Secretary

Lem T. Kendall
Chairman

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---------------------------x

HOWARD M. LASKER, et ano., :
Plaintiffs, :
:
-against-
:
HARRY G. BURKS, JR., et al., :
Defendants. :

---------------------------x

73 Civ. 552 (HFW)

SUPPLEMENTAL AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

Roger T. Wickers, being duly sworn, deposes and says:

I submit this Supplemental Affidavit to verify certain facts set forth in the Reply Memorandum.

I have read the Reply Memorandum and, to the best of my knowledge all facts stated therein are true and correct. I expressly reaffirm, since it raises new factual matter, the description of the method of selection of the five disinterested directors contained in the second full paragraph on page 13 and the first full paragraph on page 14 of the Reply Memorandum.

I also expressly reaffirm that section 4 of Article VI of the By-Laws of Fundamental is as set forth on page 11 of the Reply Memorandum.

Roger T. Wickers

Sworn to before me this
7 day of May 1975.

Irene Matisse

IRENE MATISSE
Notary Public, State of New York
No. 41-2552765
Qualified in Queens County

Fundamental Investors Inc. Prospectus dated May 1,1972 pp. 1&7

PROSPECTUS

May 1, 1972

FUNDAMENTAL INVESTORS, INC.

A MUTUAL FUND

Fundamental Investors, Inc. (the "Fund"), one of the Anchor Group of Mutual Funds, is a diversified open-end mutual investment company, incorporated under the laws of Delaware on October 17, 1932, with offices at Westminster at Parker, Elizabeth, New Jersey, telephone 201-354-1770. At December 31, 1971, approximately 172,000 shareholders owned 123,453,700 shares of the Fund having an aggregate net asset value of $1,128,627,317. Anchor Corporation ("Anchor") serves as investment adviser as described in "Investment Adviser" (page 6), and as principal underwriter as described in "Principal Underwriter" (page 6) to the Fund and the other funds in the Anchor Group.

INVESTMENT OBJECTIVE AND POLICIES

The Fund's investment objective is to increase its shareholders' capital and income return over the years. The Fund invests primarily in common stocks, or securities convertible into common stocks, but may also invest to a limited extent in preferred stocks, bonds or other securities when management believes such investments offer attractive potential growth. For defensive purposes, the Fund may invest all or a part of its assets in investment-grade corporate bonds, debentures or preferred stock, United States Government securities, or funds may be retained in cash. Through diversification and selection, the management seeks to reduce the risks of fluctuation in value and income inherent in corporate securities. There can be no assurance, of course, that the Fund's objective will be attained.

The Fund may change its holdings whenever, in the judgment of the management, changes will contribute to the attainment of the Fund's investment objective. As a matter of policy the Fund does not trade in securities for short-term profits. The investment policies and restrictions thereon permit a wide diversification among companies and industries and an endeavor is made to maintain such a diversified portfolio. While the rate of portfolio turnover will not be a limiting factor when management deems portfolio changes appropriate, it is anticipated that, given the Fund's investment objective and based upon past experience, its portfolio turnover rate will generally range from 25% to 50% annually.

The Fund generally maintains a significant cash position in its operation in order to (1) be able to take prompt advantage of attractive market prices for the purchase of securities without the necessity of liquidating other investments and (2) pay for shares redeemed within the three day period required by the Fund's Certificate of Incorporation (which is two days shorter than the period required to receive the proceeds of sale of portfolio securities). These and other normal operating requirements have resulted in the Fund generally holding cash approximating 4% of its assets, except for short periods when the cash position may be significantly lower or higher. Some of the cash is held in a non-interest bearing demand account with the Custodian, where it is immediately available and free from money market and credit risk.

The Fund has the right to purchase securities of foreign issuers which could subject the Fund to the interest

Shares are offered at prices which are determined once daily, as of the close of the New York Stock Exchange on each day the Exchange is open for trading, at the net asset value per share plus a sales charge of 8¾% (maximum) of the offering price, scaled down on purchases of $10,000 or more to 1% (minimum) depending upon size of purchase as described in "How Shares May Be Purchased" (page 3). Shares are redeemed by the Fund at net asset value without any charge as described in "Right to Have Shares Redeemed or Repurchased" (page 7).

THESE SECURITIES HAVE NOT BEEN APPROVED OR DISAPPROVED BY THE SECURITIES AND EXCHANGE COMMISSION NOR HAS THE COMMISSION PASSED UPON THE ACCURACY OR ADEQUACY OF THIS PROSPECTUS. ANY REPRESENTATION TO THE CONTRARY IS A CRIMINAL OFFENSE.

with adequate office space and equipment and pay all office expenses. Also, Anchor has agreed to assume all of the annual expenses (exclusive of interest, brokerage costs, taxes, and extraordinary charges such as litigation costs, but including all management and advisory fees) of the Fund in excess of 1% of the average daily net asset value of the Fund. All expenses not assumed by Anchor under the agreement for investment supervisory and corporate administrative services or paid by Anchor as principal underwriter pursuant to the agreement referred to under "Principal Underwriter" above are paid by the Fund, including taxes, brokerage commissions, compensation and expenses of its directors, legal and auditing expenses, custodian's and transfer agent's fees and expenses, the cost of issuing stock of the Fund, and the expense of printing and mailing reports and notices to its shareholders. As full compensation for services and expenses Anchor receives an annual fee under the agreement for investment supervisory and corporate administrative services of .5 of 1% (½ of 1%) on the first $250,000,000 of average net assets; plus .45 of 1% on average net assets between $250,000,000 and $500,000,000; plus .4 of 1% on average net assets between $500,000,000 and $750,000,000; plus .35 of 1% of average net assets between $750,000,000 and $1,000,000,000; plus .3 of 1% on average net assets between $1,000,000,000 and $1,250,000,000; plus .25 of 1% on average net assets between $1,250,000,000 and $1,500,000,000; plus .2 of 1% on average net assets in excess of $1,500,000,000. The fee is accrued daily on the basis of the number of calendar days in each year.

The agreement for investment supervisory and corporate administrative services became effective August 22, 1969 and has been renewed, from May 1, 1972 until May 1, 1973, by the Board of Directors and will continue from year to year thereafter as long as continuation is approved at least annually (a) by the vote of a majority of directors who are not parties to such agreement or "interested persons" (as defined in the Investment Company Act of 1940) of any such party and (b) either by the Board of Directors or by vote of a majority of the outstanding voting securities of the Fund. The agreement provides in substance for its automatic termination upon assignment. It may be terminated, without penalty, on 60 days notice by the directors of the Fund or by vote of a majority of the Fund's outstanding shares, or by Anchor on 60 days notice prior to May 1, 1973, or any May 1st thereafter.

During the year 1971, Anchor received $4,607,155 from the Fund for its services under the agreement with the Fund for investment supervisory and corporate administrative services.

The directors of the Fund will determine the basic investment policies of the Fund. The investment adviser will make recommendations to the Fund with respect to the purchase and sale of portfolio securities. Before each such recommendation is executed in the market, it will be first approved by either the Chairman, President, a Vice President or the Treasurer of the Fund, each of whom is an officer, or otherwise affiliated with, the investment adviser, provided, however, that no person acting for the adviser in recommending a purchase or sale of a security may also approve the transaction for the Fund. All orders on behalf of the Fund for the purchase or sale of portfolio securities will be placed by or under the direct supervision of an officer of the Fund who is also an employee of Anchor and who, in his sole discretion, determines which broker-dealer receives the order to execute the trade. In the event that two of the funds for which Anchor Corporation acts as investment adviser are purchasing the same security at the same time, purchases are made on an equal basis for each fund so that for each 200 shares of a security purchased each fund would be allocated 100 shares regardless of the fact that one fund might be seeking a larger position. Sales are handled in a similar manner. It is recognized that in some cases this practice could have a detrimental effect on the price or volume of the security as far as the Fund is concerned. In other cases, however, it is believed that the ability of the Fund to participate in volume transactions will produce better executions for the Fund. All portfolio transactions will be subsequently reported to the Board of Directors of the Fund for review and ratification.

RIGHT TO HAVE SHARES REDEEMED OR REPURCHASED

The Fund is required to redeem for cash at net asset value (without charge), out of available assets, all full and fractional shares of the Fund for which certificates in proper form are delivered for redemption, or which are offered for redemption if no certificate for them has been issued upon receipt of written request in proper form. Certificates representing shares to be redeemed should be delivered to the Custodian Bank (The First

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Fundamental Investors, Inc. Prospectus dated May 1,1974 pp.7,8 &19

eventually use up all of the shares in the open account. Furthermore, systematic cash withdrawals made concurrently with purchases of additional shares would ordinarily be disadvantageous to the investor because of the duplication of sales charges. An investor who has a withdrawal program ordinarily will not at the same time be permitted to make periodic purchases and, while single payment purchases are permitted, they will be reviewed for suitability before acceptance. Shares of the Fund may be combined with shares of any of the other Funds in the Anchor Group to make up the required minimum value. The amount, frequency and recipient of the payments may be changed or terminated by giving written notice to the Custodian Bank. The Custodian Bank or the principal underwriter may terminate this service at any time.

EXCHANGE PRIVILEGE

Shares of any Fund in the Anchor Group of Funds which the shareholder has owned for at least 10 days may be exchanged for shares of any other Fund in the Anchor Group at respective net asset values (without sales charge). The only expense is a $5 fee of the principal underwriter to cover costs. An exchange constitutes a sale for federal income tax purposes and depending upon the circumstances, a capital gain or loss may be realized by the shareholder on any such exchange. The Anchor Group consists of the following Funds with the following investment objectives:

Anchor Growth Fund, Inc.—to provide long-term growth of the investor's money.

Anchor Income Fund, Inc.—to provide current income and also possible long-term growth of capital.

Anchor Reserve Fund, Inc.—to provide high current income consistent with liquidity and the conservation of capital with no investments in common or preferred stocks.

Anchor Spectrum Fund, Inc.—to seek to generate satisfactory total return on invested capital over the years.

Fundamental Investors, Inc.—to provide long-term growth of capital and income.

Washington National Fund, Inc.—to provide growth of capital and income through a limited selection of well-known companies.

Each Fund is an open-end investment company and has the same investment adviser, principal underwriter, and Board of Directors. A shareholder desiring to exercise the exchange privilege will be sent instructions, an exchange application and the current prospectus of the Fund whose shares he wishes to acquire. Exchanges will be made upon receipt of the properly completed exchange application. A shareholder contemplating an exchange should carefully consider the investment objective of the Fund currently held and of the Fund into which he proposes to exchange.

RETIREMENT AND PROFIT SHARING PLANS

There are available to corporations through Anchor Corporation, the principal underwriter, prototype retirement and profit-sharing plans and related custody agreements in forms which have been declared by the Internal Revenue Service to be acceptable when appropriately adopted, under Section 401(a) of the Internal Revenue Code. These plans provide for the investment of contributions in one or more of the Anchor Group of Funds. Income dividends are reinvested at the public offering price and capital gains distributions, if any, are reinvested at net asset value. The Custodian Bank furnishes custodial services under the plans and related agreements according to the following schedule of fees: $5 initial establishment fee for each plan, $3 annual fee for each employee sub-account in the plan in which employer contributions are made, $3 additional annual fee for each employee sub-account in which voluntary employee contributions are made, $3 additional annual fee for each employee sub-account in which mandatory employee contributions are made (thrift plan only) and a $2 per Fund additional annual fee for each employee sub-account in which contributions are invested in more than one Fund in the Anchor Group. These fees are billed to the employer by the Custodian Bank but, if not paid by the employer, can be charged to the sub-accounts of participating employees in proportion to the value of each sub-account.

For those self-employed individuals who wish to purchase shares of the Fund in conjunction with the Self-Employed Individuals Tax Retirement Act of 1962 (the Keogh Act) there is available through the principal underwriter a form of Custodial Account Agreement. The Custodian Bank will furnish custodial services under the agreement, as required by such Act, for which no service fee is presently charged to the self-employed individual. For further details, including the right to appoint a successor custodian, see the form of Custodial Account Agreement provided by Anchor Corporation.

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PRINCIPAL UNDERWRITER

Anchor and its predecessors in business have acted as principal underwriters for the Fund since 1941. Anchor, with offices at Westminster at Parker, Elizabeth, New Jersey, is a subsidiary of Washington National Corporation ("WNC") of Evanston, Illinois, which owns all of the outstanding common stock of Anchor representing approximately 95% of the voting power of Anchor. WNC, a Delaware corporation, is the parent and sole stockholder of Washington National Insurance Company, a stock life insurance company organized under the laws of Illinois, also having its principal offices in Evanston. Descendants of H. R. and G. R. Kendall, co-founders of Washington National Insurance Company, own directly or indirectly approximately 48.6% of the outstanding capital stock of WNC. The G. R. Kendall Foundation, together with G. R. Kendall's son, G. P. Kendall, own approximately 20.3% of the outstanding capital stock of WNC and may be considered to control WNC.

Anchor serves as principal underwriter for the Fund's shares under an Agreement effective August 22, 1969 which has been renewed, from May 1, 1974 until May 1, 1975 by the Board of Directors. The Agreement with Anchor may be continued from year to year thereafter if approved at least annually (a) by the vote of a majority of directors who are not parties to such Agreement or "interested persons" (as defined in the Investment Company Act of 1940) of any such party and (b) either by the Board of Directors or by vote of a majority of the outstanding voting securities of the Fund. The Agreement provides in substance for its automatic termination upon assignment.

During the last three years, Anchor distributed shares of the Fund and received commissions thereon, as follows:

Year	Aggregate Net Asset Value of Shares Distributed	Gross Sales Commissions Received	Retained by Anchor Before Payment of its Expenses	Allowance to Investment Dealers
1971	$24,650,839	$1,295,955	$350,909	$945,046
1972	18,722,311	1,013,227	281,069	732,158*
1973	15,444,296	847,403	242,956	604,447*

*Includes $76,603 and $77,623 allowed to Anchor and investment dealers affiliated with Anchor, during 1972 and 1973, respectively.

Under the agreement with Anchor the Fund does not pay any portion of these amounts.

INVESTMENT ADVISER

Anchor also serves as investment adviser to the Fund and to the other Funds in the Anchor Group.

Anchor supervises the investment operations of the Fund and the composition of its portfolio and furnishes the Fund advice and recommendations with respect to investments, investment policies and the purchase and sale of securities. The services of Anchor are rendered under an agreement for investment supervisory and corporate administrative services which provides that Anchor shall furnish the services of persons competent to perform all executive functions for the Fund and the clerical, bookkeeping and other personnel required to provide effective corporate administration for the Fund. The agreement also provides that Anchor shall pay the compensation of all such persons, shall provide the Fund with adequate office space and equipment and pay all office expenses. Also, Anchor has agreed to assume all of the annual expenses (exclusive of interest, brokerage costs, taxes, and extraordinary charges such as litigation costs, but including all management and advisory fees) of the Fund in excess of 1% of the average daily net asset value of the Fund. All expenses not assumed by Anchor under the agreement for investment supervisory and corporate administrative services or paid by Anchor as principal underwriter pursuant to the agreement referred to under "Principal Underwriter" above are paid by the Fund, including taxes, brokerage commissions, directors' compensation and expenses (which aggregated $60,695 for the year ended December 31, 1973) legal and auditing expenses, custodian's and transfer agent's fees and expenses, the cost of issuing stock of the Fund, and the expense of printing and mailing reports and notices to its shareholders. As full compensation for services and expenses Anchor receives an annual fee under the agreement for investment supervisory and corporate administrative services of .5 of 1% (½ of 1%) on the first $150,000,000 of average net assets; plus .45 of 1% on average net assets between $150,000,000 and $400,000,000; plus .4 of 1% on average net assets between $400,000,000 and $650,000,000; plus .35 of 1% of average net assets between $650,000,000 and $900,000,000; plus .3 of

DIRECTORS AND OFFICERS

Following is a list of directors and officers of the Fund. Unless otherwise stated, their addresses are Westminster at Parker, Elizabeth, N. J. The number of shares of the Fund owned directly or indirectly by each director on March 1, 1974 is shown in parenthesis. All directors and officers of the Fund hold the same positions with Anchor Growth Fund, Inc., Anchor Income Fund, Inc., Anchor Reserve Fund, Inc., Anchor Spectrum Fund, Inc. and Washington National Fund, Inc.

EDWARD B. BURR — Chairman of the Board and Director. Vice Chairman of Anchor. Director of Washington National Corporation. Director of Washington National Insurance Company. Chairman of Anchor National Life Insurance Company. Chairman and President of Anchor National Financial Services, Inc. Chairman of the Board of Washinton National Trust Company. Director of Anchor National Life Insurance Company of New York. (14,612†)

JOHN R. HAIRE — President and Director. Chairman of Anchor. Director of Washington National Corporation. Director of Washington National Insurance Company. Director of Anchor National Life Insurance Company. Director of Anchor National Financial Services, Inc. Director of Anchor National Life Insurance Company of New York. (13,176†)

HOMAS A. MARTIN — Executive Vice President (Investments) and Director. President and Director of Anchor. Director of Anchor National Financial Services, Inc. Director of Anchor National Life Insurance Company of New York. Until April, 1970, President, Director and Chief Executive Officer of Van Strum and Towne, Inc. and the Channing Group of Mutual Funds, and thereafter until February, 1971, President, Director and Chief Executive Officer of Falcon Capital Corporation and Falcon Fund, Inc. (1,164†)

P. HUTCHISON — Director. *1630 Chicago Avenue, Evanston, Illinois.* President and Director of Washington National Corporation, and Vice Chairman and Director of Washington National Insurance Company. Director of Anchor. Director of Anchor National Life Insurance Company and Washington National Trust Company. Director of Anchor National Life Insurance Company of New York. (63)

• DONALD L. KEMMERER — Director. *110 David Kinley Hall, University of Illinois, Urbana, Illinois.* Professor Emeritus of Economics at the University of Illinois.

• LOUIS F. LAUN — Director. *3029 O Street, Washington, D.C.* Associate Administrator for Operations of the Small Business Administration. Until 1971, Vice President of Celanese Corporation, manufacturer of synthetic fibers. (765)

• MARY S. O'CONNOR — Director. *1 De Witt Road, Elizabeth, N.J.* Director and Member of the Executive and Trust Committees of Central Home Trust Company of Elizabeth, N.J. (132)

• CHARLES F. PHILLIPS — Director. *Maple Hill Lane, Auburn, Maine.* President emeritus, Bates College. (86)

• BERYL ROBICHAUD — Director. *Princeton Road, Hightstown, New Jersey.* Senior Vice President, McGraw-Hill, Inc., publishers. (312)

• WILLIAM J. STEPHENS — Director. *21 Live Oak Road, Sea Pines Plantation, Hilton Head Island, South Carolina.* Director, Jones and Laughlin Steel Corporation. President (1963-1969) and Chairman and Chief Executive Officer (1969-1972) of Jones and Laughlin Steel Corporation. (200)

MELVIN INTRILIGATOR — Executive Vice President (Operations). Senior Vice President and Director of Anchor.

ROGER T. WICKERS — Vice President and Secretary. Vice President and Secretary of Anchor.

TERRY W. GOODWIN — Vice President. Vice President of the Investment Division of Anchor. Until May 1969, Trader with Travelers Insurance Co. and thereafter until May 1972, Assistant Vice President of Standard & Poor's InterCapital, Inc.

ARTHUR M. KESSELHAUT — Treasurer. Employee of Anchor.

• Not affiliated with Anchor. Not "interested persons" of the Fund or of Anchor as that term is defined in the Investment Company Act of 1940.

† Includes interest in retirement trust of Anchor Corporation.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - - -x

U.S. DISTRICT COURT
FILED
SEP 26 1975
S.D. OF N.Y.

HOWARD M. LASKER and IRVING GOLDBERG,

Plaintiffs,

- against -

HARRY G. BURKS, JR.,
EDWARD B. BURR,
THOMAS F. CHALKER,
JOHN R. HAIRE,
HARVEY C. HOPKINS,
S.P. HUTCHINSON,
DONALD L. KEMMERER,
A.S. MIKE MONRONEY,
CHARLES F. PHILLIPS,
JEPTHA WADE,
ANCHOR CORP., and
FUNDAMENTAL INVESTORS, INC.,

Defendants.
- - - - - - - - - - - - - - - - - - -x

MEMORANDUM DECISION AND ORDER

73 Civ. 552 (HFW)

#43128

HENRY F. WERKER, D. J.

This is a shareholders' derivative action brought by two stockholders on behalf of Fundamental Investors, Inc. ("Fundamental" or the "Fund"), a registered investment company under the Investment Company Act of 1940, 15 U.S.C. §§ 80a-1 et seq. The defendants are the Fund's investment adviser, Anchor Corporation ("Anchor"), a registered investment adviser under the Investment Advisers Act of 1940, 15 U.S.C. §§ 80b-1 et seq., and several former and present members of the Board of Directors of the Fund. The dispute between the parties centers around the Fund's purchase, on Anchor's recommendation, of $20 million in commercial paper of the now bankrupt Penn Central Transportation Company. As described in detail below the complaint charges that in connection with the purchase of the Penn Central paper the defendants violated various sections of the Investment Company Act, the Investment Advisers Act and the common law. The Fund, joined by all defendants, has now moved under Rule 12(b) of the Federal Rules of Civil Procedure to dismiss this action on the ground that the independent members of the Board of Directors of the Fund have unanimously determined that, in their business judgment, this action is contrary to the best interests of the shareholders of the Fund.

BACKGROUND

The Fund made its purchases of Penn Central 270-day notes from Goldman, Sachs & Co., in lots of $5 million each on November 26, December 2, 4 and 8, 1969. Unfortunately for the Fund and other holders of Penn Central commercial paper, Penn Central, on June 21, 1970, filed a petition for reorganization under section 77 of the Bankruptcy Act with the result that the notes were not paid at maturity or at any time to date. Faced with the possibility of a substantial loss, the Fund and other plaintiffs instituted suit in the Southern District of New York on November 4, 1970 against Goldman, Sachs & Co., for rescission of their purchases of the Penn Central Notes. That action was entitled Welch Foods, Inc. v. Goldman, Sachs & Co., 70 Civ. 4811 (the "Welch" action).

The instant derivative suit was filed on February 5, 1973. Jurisdiction was predicated on section 44 of the Investment Company Act of 1940 (15 U.S.C. § 80a-43), section 214 of the Investment Advisers Act of 1940 (15 U.S.C. § 80b-14) and pendent jurisdiction. The complaint alleges that in making the purchases of Penn Central commercial paper the Fund and Anchor relied solely and exclusively on Goldman, Sachs & Co., and made no independent investigation of the financial condition of Penn Central or the quality of its commercial paper. By failing to make an independent investigation it is alleged that Anchor failed to meet its responsibility as the Fund's investment adviser and that the Fund's directors knew or should have know of, and acquiesced in, the failure of Anchor to meet its responsibilities and thus failed to meet their responsibilities as members of the Fund's Board of Directors. Had an independent investigation been made it is alleged that a number of material adverse facts concerning the financial condition of the Penn Central and the quality of its commercial would have been learned. As a result of their actions, or inactions, the defendants are charged with engaging in acts and practices constituting gross misconduct and a gross abuse of trust in respect of the Fund in violation of section 36 of the Investment Company Act. Anchor is also alleged to have violated section 206, the antifraud section, of the Investment Advisers Act of 1940. Plaintiffs also claim that the defendants violated their common law fiduciary duty to the Fund and that Anchor, aided and abetted by the directors, breached its investment advisory contract with the Fund.

The complaint goes on to allege that from November 28, 1969 to June 21, 1970, the date Penn Central filed for reorganization, the financial condition of the Penn Central deteriorated. During this period it is alleged that Anchor and the Fund directors failed to commence a thorough and adequate investigation of, and keep under continuous review, the financial condition of Penn Central and the quality and safety of its commercial papers. It is also alleged that during this period the Fund's directors failed in their obligations to make adequate attempts to resell the Penn Central commercial paper it held and that Anchor failed to advise the Fund of the advisability of selling the commercial paper. Plaintiffs again claim that these acts by the defendants violate section 36 of the Investment Company Act; that Anchor violated section 206 of the Investment Advisers Act; that all defendants breached their common law fiduciary duty; and that Anchor, aided and abetted, by the Fund's directors breached its investment advisory contract. Finally, the complaint alleges that the defendants violated section 13(a)(3) of the Investment Company Act by allowing the Fund to hold more than 10% of the securities of any one issuer (Penn Cental) in contravention of the Fund's registration statement filed pursuant to section 8(b) of the Investment Company Act.

Subsequent to the filing of this derivative action, all defendants moved to stay this action pending the resolution of the claims of Fundamental in the Welch action. The stay was granted by Judge Gurfein on November 12, 1973. Fundamental's claims against Goldman, Sachs & Co., in the Welch action were settled on July 9, 1974. The terms of the settlement provided that Goldman, Sachs & Co. would take back the Penn Central notes, pay Fundamental $5,250,000.00 in cash and assign to Fundamental a 73.75% interest in the proceeds of the notes in the reorganization proceedings.

With the settlement of the Welch action, Fundamental had to determine what position to take in this suit. It is necessary to set forth in detail the actions taken by the Fund's Board of Directors since it forms the basis of the defendants' motion to dismiss.

Fundamental's Board of Directors met on July 24, 1974 to review the settlement of the Welch action and to decide what position to take in this derivative action. Since five of the directors are defendants in this action and one is a director of Anchor, the Board determined that the remaining five directors who they considered disinterested would, acting as a quorum pursuant to the by-laws,[1] decide what position the Fund should take in this action. The five disinterested directors then decided to retain the Honorable Stanley H. Fuld, former Chief Judge of the New York Court of Appeals, to review the entire Penn Cental matter and to report to the Board.

After reviewing the complaint in this

derivative action, the proceedings in the Welch action, the files of Anchor and the Fund relating to the purchase of Penn Central paper and after interviewing officers and employees of the Fund and analyzing the facts and the law, Judge Fuld sent a memorandum to the disinterested directors on December 5, 1974 in which he stated his opinion that there was "no violation by Anchor or by the Fund directors of any provision of statute or of any common law or contractual obligation to the Fund, in connection with the acquisition and retention of the Penn Central commercial paper." (Dec. 5, 1974 Memorandum at 2). Judge Fuld went on to discuss in detail each of the claims asserted in this suit. Finally, Judge Fuld defined and discussed three alternative courses of action which the disinterested directors might pursue, i.e., (1) seek realignment so as to become a plaintiff for the purpose of exercising control over and prosecuting the action; (2) conclude that the action is sufficiently lacking in merit and move to have the suit dismissed; and (3) take a neutral position and permit the action to proceed for the Fund's benefit under the auspices of the present plaintiffs.

After the disinterested directors reviewed his report and submitted questions to him, Judge Fuld sent a supplemental memorandum to the disinterested directors on December 18, 1974. In his memorandum Judge Fuld discussed in more detail the possibility that the Board should move to dismiss this suit as not being in the best interests of the Fund and the possible scope of judicial review of such a decision.

The disinterested directors then met in a series of special meetings to consider Judge Fuld's memoranda. The directors met with Judge Fuld; John R. Haire, Chairman and Chief Executive of Anchor; Donald L. Kemmerer and Charles F. Phillips, unaffiliated directors of Fundamental; and Eugene Souther, litigation counsel to Fundamental in this action. Questions were posed by the directors to all of these in attendance concerning the merits of the derivative action and the alternatives open to the Fund's Board. The disinterested directors again met in private and decided to give additional consideration to the problem and convey any questions to the designated Chairman of the disinterested directors, Leon T. Kendall.

A second special meeting of the disinterested directors was held on January 6, 1975. Upon review of the alternatives available, the directors present unanimously determined[2] that the prosecution of this action was contrary to the best interests of the shareholders of Fundamental and that counsel should be directed to seek dismissal of the action. The factors considered by the directors in reaching their conclusion are summarized in the Kendall affidavit ¶ 22, and are as follows:

> "(a) Chief Judge Fuld's opinion that there is no merit to the action and little likelihood of its success;
>
> (b) The business interruption to Anchor, distraction of its personnel and the likely inability for it to attract and maintain personnel during pendency of the action necessarily would be harmful to the shareholders of Fundamental;

(c) If the action were to proceed against Anchor with the acquiescence or under the control of Fundamental, the adversary relationship that would be created between Fundamental and Anchor and the attendant serious distraction of Anchor's personnel from their efforts on behalf of the shareholders of Fundamental would leave us no practical alternative but to remove Anchor as investment adviser and to seek to retain a new investment adviser; this would necessarily result in delay, uncertainty and an inevitable lapse in the management of Fundamental's affairs to the serious detriment of its shareholders;

(d) Anchor had acted in good faith and in what it believed was in the best interests of Fundamental's shareholders in purchasing the Penn Central commercial paper;

(e) Anchor had acted reasonably and had followed procedures prudent at the time in light of the then generally held belief that commercial paper was equivalent to cash;

(f) A vast number of other institutional investors, including many major banks in New York City and throughout the country and certain major mutual funds, had also believed that Penn Central was a sound business enterprise and had purchased Penn Central commercial paper at the time, and many such investors still held that paper when Penn Central petitioned for reorganization;

(g) To take no position at all and thereby to allow two of the more than 90,000 shareholders to determine the course of this action would not be a decision at all, but an avoidance of our obligation to all the shareholders;

(h) Chief Judge Fuld's advice that an investment adviser is not a guarantor of the investments it makes and can only be charged for breaches of contract or of

> the standards applied by the pertinent statutes and regulations. Chief Judge Fuld had analysed the facts and law and had concluded that Anchor was not at fault and that there was little likelihood that Anchor would be held to have violated any statute or regulation or to have breached any agreement or duty;
>
> (i) Given Chief Judge Fuld's opinion, if the action were to proceed, there could be unnecessary costs to the shareholders of Fundamental for legal fees, both for its own counsel and for the director defendants, who would be entitled to reimbursement of counsel fees if they were found to be liable to Fundamental; and
>
> (j) Even if there were a recovery of the theoretical maximum amount of damages, the net result to the shareholders of Fundamental would be little more than a net recovery of 10 cents per share, or approximately 2% of Fundamental's net asset value. The remote chance of recovering that small amount was not worth the risk of the serious damage to Fundamental's shareholders which proceeding with this action might produce."

DISCUSSION

The Fund now argues that the extensive consideration given to the alternatives available to the independent directors culminating in their decision to seek dismissal of this suit was a good faith exercise of business judgment which cannot be upset by the two shareholder plaintiffs who would force Fundamental to maintain this action. The plaintiffs, of course, dispute this position. After emphasizing, the merits of the claims they have asserted and criticizing the conclusions reached by Judge Fuld, plaintiffs make the following arguments in opposition to the defendants' motion to dismiss: (1) because of the broad regulatory legislation embodied in the Investment Company and Investment Advisers Act, the decision whether to prosecute violations of that Act is not a matter of "business judgment" to be decided by directors of a regulated fund; (2) to seek dismissal of the action would be tantamount to an unlawful ratification of defendants' conduct; (3) if a majority of the board's directors are disqualified, the existence of a "disinterested" minority is irrelevant; (4) as a matter of law the minority directors are not "disinterested;" (5) the minority directors gave undue deference to Anchor in making their decision; and (6) the motion is premature and defective under Rule 23.1. These arguments will now be considered.

At the outset, the obvious should be stated - a shareholder's derivative suit is an action brought on behalf of a corporation in which any recovery runs in favor of the corporation. Ordinarily, it is the corporation which would seek the right to enforce any cause of action it might have. Rule 23.1 of the Federal Rules of Civil Procedure requires that a complaining shareholder demand action from the board of directors before bringing suit.[3] The purpose of that "demand" rule "is to give the derivative corporation itself the opportunity to take over a suit which was brought on its behalf in the first place, and thus to allow the directors the chance to occupy their normal status as conductors of the corporation's affairs." Brody v. Chemical Bank, 517

F.2d 932 at 934 (1957), citing *In re Kauffman Mutual Fund Actions*, 479 F.2d 257, 263 (1st Cir.), *cert. denied*, 414 U.S. 857 (1973).

No demand was made on the Fund's Board of Directors in this case because plaintiffs alleged (and it is not disputed) that the majority of the Fund's directors are defendants charged with wrongdoing and as such a demand would be futile.[4] While no set formula has been developed for determining what facts must be plead in order to excuse a demand on the Board of Directors - *see generally*, 7A Wright & Miller § 1831 (1972) - that issue is not presented in this case. Instead, this case presents the rather unique situation where a designated independent minority of a Board has taken unilateral action with respect to a suit brought on behalf of the corporation. The decision of the independent directors was made after the settlement of the *Welch* action which put an end to the stay in this suit. Plaintiffs argue that even if suit were instituted at the present time (*i.e.*, after settlement of the *Welch* action) no prior demand on the Fund's Board would have been necessary because the majority of directors would be disqualified. To allow a minority of the Board to seek dismissal of the suit would, it is argued, destroy the role of "presumptive disqualification."

While no case is directly in point, this circuit has recently considered an analagous issue in *Brody* v. *Chemical Bank*, *supra*. There, the district court had dismissed the derivative causes of action in plaintiff's complaint because the allegations in the complaint were insufficient to excuse a demand on the Board of Directors. Plaintiff had alleged futility of demand because the majority of directors were controlled by the defendant corporation. However, since institution of the suit, a new Board had been installed but no demand was made on it. The second circuit agreed that a demand should have been made but remanded because of the gravity of the alleged wrongdoing. 482 F.2d at 1114. After remand, the plaintiffs filed a second amended complaint but made no demand on the Board of Directors because they alleged that a demand on the Board of Directors at the time the action was originally commenced would have been futile. The district court again dismissed the derivative counts and the second circuit affirmed on the reasoning that a demand should have been made on the new directors. Brody, supra at 934.

In this case, within a short period after settlement of the Welch action and the dissolution of the stay, the Board of Directors met and designated the independent directors to make a decision as to the Fund's position in this suit. In the Court's view, the independent minority of directors had the power to decide what position the Fund should take. This is consistent with the policy that a corporation be given the opportunity to control a lawsuit brought on its behalf, that the Board be allowed to exercise its normal functions in running the corporation, and that a derivative suit should be resorted to as a last alternative. *See* 3B J. Moore, Federal Practice ¶ 23.1.19, at 23.1-252-53 (2d ed. 1974) quoted in *Brody*, *supra* at 934.

Although the independent directors could properly move for dismissal of this action it is now necessary to determine whether good faith business judgment of the directors can be used as a ground for dismissal. Defendants rely on a line of cases which hold that absent fraud or corruption or other disqualifying factor, the good faith business judgment of the directors not to bring suit is final. *See*, *e.g.*, *Hawes* v. *Oakland*, 104 U.S. 450 (1881); *Corbes* v. *Alaska Treadwell Gold Mining Co.*, 187 U.S. 455 (1903); *United Copper Securities Co.* v. *Amalgamated Copper Co.*, 244 U.S. 261 (1917); *Swanson* v. *Traer*, 249 F.2d 854 (7th Cir. 1957); *Ash* v. *IBM*, 353 F.2d 491 (3d Cir. 1965), *cert. denied*, 384 U.S. 927 (1966); *In re Kauffman Mutual Fund Actions*, 479 F.2d 257 (1st Cir.), *cert. denied*, 414 U.S. 857 (1973). *Cf.* *Allegheny Corp.* v. *Kirby*, 344 F.2d 571 (2d Cir. 1965), *cert. dismissed*, 384 U.S. 28 (1966).

As the Supreme Court recognized in *United Copper*, *supra*, the decision whether or not to sue is a matter of internal management. 244 U.S. at 263. Absent fraud or corruption or other factors, the stockholders cannot force the corporation to sue.

> "[Stockholders] cannot secure the aid of of a court to correct what appear to them to be mistakes of judgment on the part of

> the officers . . . This rule applies whether the mistake is due to error of fact or of law, or merely to bad business judgment. It applies . . . where the mistake alleged is the refusal to assert a seemingly clear cause of action . . . ."

Ashwander v. Valley Authority, 297 U.S. 288, 343 (1936).

The reasoning behind the "business judgment rule" and its application to derivative suits was recently discussed in this district in Bernstein v. Medrobanca, Docket # 73 Civ. 3549, (S.D.N.Y. Dec. 24, 1974) (Connor, J.). There the Court reaffirmed the business judgment rule although summary judgment was denied, with leave to renew, because possible evidence of bad faith on the part of the Board of Directors in deciding not to sue was in the possession of the defendant's and plaintiff was given an opportunity to discover it.

This court cannot accept plaintiffs' argument that because the allegations of the complaint concern violations of the Investment Company Act and the Investment Advisers Act, the Board has no power to exercise its business judgment because of the strong public policies behind those Acts. Unlike § 16(b) of the Securities Exchange Act which allows shareholders to bring suit if the directors decline a demand, Congress has made no such statutory provision with respect to suits brought under the Investment Company and Investment Advisers Act. It is true that causes of action under those Acts are implied rights of action. Brown v. Bullock, 194 F. Supp. 207 (S.D.N.Y.), aff'd 294 F.2d 415 (2d Cir. 1961); Bolger v. Laventhol, Krekstein, Horwath & Horwath, 381 F. Supp.

260 (S.D.N.Y. 1974). It does not necessarily follow that because the right is implied a derivative suit should always be allowed despite the good faith exercise of business judgment by the directors not to sue. This court is of the opinion that absent a statutory exception, whether a cause of action is expressly authorized or is "implied" the directors of a corporation should be given the chance to perform their duties in running the business of the corporation including whether to prosecute a cause of action. If they have exercised their business judgment in good faith then a decision not to sue should be final.

The court must also reject plaintiffs' argument that the decision not to sue was tantamount to an illegal ratification. Although it can be argued that derivative suits should be allowed when the Board has refused to sue on a nonratifiable wrong - _see_ Note, Demand on Directors and Shareholders as a Prerequisite To a Derivative Suit, 73 Harv. L. Rev. 746, 762 (1960); _Rogers_ v. _American Can Co._, 305 F.2d 297 (3d Cir. 1962), the question of business judgment is separate from the question of ratification. _S. Solomont & Sons Trust_ v. _New England Theatres Operating Corp._, 93 N.E.2d 241, 247 (Mass. 1950). Many of the cases which established the business judgment rule and its relation to derivative suits have involved claims which were arguably non-ratifiable. _See_, _i.e._, _United Copper_, _supra_; _Ash_ v. _IBM_, _supra_ (antitrust violations).

Another question which has been considered is whether the merits of the plaintiffs claim should be considered in deciding whether the directors decision should be upheld. To do so would place the Court in the position of substituting its judgment for that of the directors which if made in good faith should not be disturbed. The court has carefully reviewed the many factors which the Board considered before making its decision not to sue. Although plaintiffs argue that there is more merit to their claims than Judge Fuld gave them, there were many other factors considered by the directors. As outlined in the Kendall Affidavit ¶ 22 - which led the directors to their decision.

If the minority directors were truly disinterested and independent the court will not substitute its judgment for that of the Board. Plaintiffs have not argued that the minority of directors have acted fraudulently or corruptly. They have argued that they are not disinterested or independent because they occupy similar positions with other funds in the Anchor group and that Anchor controls the selection and nomination of the Fund's directors. This assertion has been denied and it is alleged by the movant that these directors were nominated by a three man Directors Qualification Committee of which two members were unaffiliated with Anchor.

Interest or lack of independence would go toward the issue of good faith. I am constrained therefore to permit the plaintiffs to pursue discovery with respect to the relationships of the minority directors and the Qualifications Committee to determine whether the minority directors were disinterested or independent. It would appear that all of the other questions resolved herein are dependent upon a resolution of this issue. The plaintiffs are to conduct their discovery within 90 days from the date hereof.

The motion is denied without prejudice to renew the same upon the completion of discovery.

SO ORDERED.

Dated: New York, New York
September 24, 1975

U. S. D. J.

HOWARD M. LASKER, et al. v. HARRY G. BURKS, JR., et al.,
73 Civ. 552

NOTES.

1. Section 1 of Article Eight of the Certificate of Incorporation of Fundamental provides that:

> "The number of directors which shall constitute the whole board of directors shall be such as from time to time shall be fixed by or in the manner provided in the by-laws which shall also provide the number of directors which shall constitute a quorum; provided, that in no case shall a quorum be less than one-third of the total number of directors nor less than two directors."

Section 4 of Article Six of the By-Laws of Fundamental provides that:

> "Quorum: Except as otherwise provided by law, the Certificate of Incorporation, or these By-Laws, at all meetings of the Board of Directors one-third of the directors then in office, but not less than three directors shall be necessary for the transaction of business."

2. One director, Mary S. O'Connor, was not present at the meeting. She had previously told Mr. Kendall what her decision was. That vote was reaffirmed by Mrs. O'Conner at a special meeting of the disinterested directors held on January 22, 1975. Even without her presence, four directors would constitute a quorum.

3. Rule 23.1 provides:

> "In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege (1) that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law, and (2) that the action is not a

> collusive one to confer jurisdiction on a court of the United States which it would not otherwise have. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs."

4. No issue has been raised concerning whether a demand on the shareholders was necessary. Plaintiffs' complaint alleges that under applicable law and the Certificate of Incorporation and By-Laws of the Fund, the directors and officers are vested with the management of the Fund. Complaint ¶ 7(b).

156A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- -x

HOWARD M. LASKER and IRVING GOLDBERG,

Plaintiffs,

- against -

HARRY G. BURKS, JR.,
EDWARD B. BURR,
THOMAS F. CHALKER,
JOHN R. HAIRE,
HARVEY C. HOPKINS,
S.P. HUTCHINSON,
DONALD L. KEMMERER,
A.S. MIKE MONRONEY,
CHARLES F. PHILLIPS,
JEPTHA WADE,
ANCHOR CORP., and
FUNDAMENTAL INVESTORS, INC.,

Defendants.

- -x

AMENDMENT TO
MEMORANDUM DECISION
AND ORDER

73 Civ. 552 (HFW)

#43128

FILED
U.S. DISTRICT COURT
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S.D. OF N.Y.

HENRY F. WERKER, D. J.

Memorandum Decision and Order filed in the above entitled action dated September 24, 1975 is amended to read as follows:

Page 11, line 10	Directors - see generally, 7A Wright & Miller § 1831 (1972) - SHOULD BE: Directors - see generally, 7A Wright & Miller *Federal Practice & Procedure* § 1831 (1972) -
Page 14, line 4	in this district in Bernstein v. *Medrobanca* . . . SHOULD BE: in this district in Bernstein v. *Mediobanca* . . .
Page 15, line 2 from bottom	non-ratifiable. See, *i.e.*, United States . . . SHOULD BE: non-ratifiable. See *e.g.* United States . . .

MICROFILM
OCT 22 1975

Page 16, line 11	directors. As outlined . . . SHOULD BE: directors, as outlined . . .
Page 16, line 15	that of the Board. Plaintiffs have not argued that the minority of DELETE the last word of

SO ORDERED.

Dated: New York, New York

October 17, 1975

Henry Werker

U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
-------------------------------x

HOWARD M. LASKER and IRVING GOLDBERG,

Plaintiffs,

- against -

HARRY G. BURKS, JR.,
EDWARD B. BURR,
THOMAS F. CHALKER,
JOHN R. HAIRE,
HARVEY C. HOPKINS,
S. P. HUTCHINSON,
DONALD L. KEMMERER,
A. S. MIKE MONRONEY,
CHARLES F. PHILLIPS,
JEPTHA WADE,
ANCHOR CORP., and
FUNDAMENTAL INVESTORS, INC.,

Defendants.

-------------------------------x

ORDER

73 Civ. 552 (HFW)

U. S. DISTRICT COURT
FILED
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S. D. OF N. Y.

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JAN 8 1976

HENRY F. WERKER, D. J.

Plaintiffs' motion for reargument based on Judge Gagliardi's decision in Boyko v. The Reserve Fund, Inc., 74 Civ. 3419 (S. D. N. Y. Sept. 31, 1975) is denied. This court finds that Boyko is distinguishable from the case at hand due to the fact that Boyko concerns Section 36(b) of the Investment Company Act, 15 U.S.C. § 80a-35(b). That section specifically gives a security holder a cause of action against the investment adviser or an affiliated person on behalf of the investment company with respect to the receipt of compensation. The question of who should determine whether or not the corporation is to sue is different under Section 36(a), 15 U.S.C. § 80a-35(a), where the basis for suit is the more general claim of violation of fiduciary duty and where no cause of action is given in the statute to a security holder on such a claim.

SO ORDERED.

DATED: New York, New York

January 6, 1976

Henry F. Werker

U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

HOWARD M. LASKER, et ano., : 73 Civ. 552 (HFW)

Plaintiffs, : AFFIDAVIT IN SUPPORT OF RENEWED MOTION TO DISMISS

-against- :

HARRY G. BURKS, JR., et al., :

Defendants. :

- -x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

ROGER T. WICKERS, being duly sworn, deposes and says:

1. I am Senior Vice President of Fundamental Investors, Inc. ("Fundamental"), and I submit this affidavit in support of the renewed motion by Fundamental to dismiss this action.

2. Permission of the Court to renew the motion to dismiss was expressly granted in the Memorandum Decision and Order dated September 24, 1975, as amended October 17, 1975, and reported at 404 F. Supp. 1172 (S.D.N.Y. 1975) (Werker, J.). For the convenience of the Court, a copy of the Memorandum Decision and Order is annexed hereto as Exhibit A.*

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*To avoid unnecessary repetition, I respectfully seek leave of this Court to incorporate herein by reference the moving papers and reply papers of defendants on the original motion to dismiss. Those papers are part of the file of this action, and, if desired, an additional set will be made available to the Court.

Prior Proceedings

3. Fundamental, joined by all other defendants, moved to dismiss this action on the grounds that it was not in the best interests of the shareholders of Fundamental. The motion was made pursuant to a determination by a quorum of disinterested directors in the exercise of their business judgment, after receiving the advice of independent special counsel. Plaintiffs opposed the motion on numerous grounds. This Court, in the Memorandum Decision and Order, considered and rejected each and every argument advanced by plaintiffs in opposition to the motion by defendants to dismiss.

4. The sole issue that was left open by this Court in the Memorandum Decision and Order is: were the five members of the Board of Directors of Fundamental who made the decision to move to dismiss this action disinterested and independent, or were they, as plaintiffs contend, interested and lacking independence. This Court wrote (404 F. Supp. at p. 1180):

> "If the minority directors were truly disinterested and independent the Court will not substitute its judgment for that of the Board."

5. This Court then permitted plaintiffs "to pursue discovery with respect to the relationships of the minority directors and the Qualifications Committee to determine whether the minority directors were disinterested or independent." 404 F. Supp. at p. 1180. The discovery has now been completed and the results are described hereinbelow.

The Discovery Proceedings

6. Plaintiffs conducted the depositions of each and every one of the five members of the Disinterested Quorum, as well as the deposition of the Chairman of Anchor Corporation ("Anchor"), the investment adviser to Fundamental. The testimony exceeds 1,000 pages of transcript. In addition, defendants made two major document productions, satisfying all requests made by plaintiffs for production of documents.

7. Despite extensive discovery proceedings, the plaintiffs have failed to turn up any evidence whatsoever that any of the five directors who made the decision for the Board (Messrs. Kendall, Stephens and Laun, Dr. Robichaud and Mrs. O'Connor) was not truly disinterested and independent.

8. Each of the five directors submitted himself or herself to extensive, probing questioning on their business and personal relationships with all of the named defendants. The testimony is abundantly clear that none of these five persons--each a highly distinguished individual in his or her own career--was interested or lacking independence. Each made his or her own decision independently, thoughtfully and with the advice and assistance of eminent special counsel, Stanley H. Fuld, former Chief Judge of the State of New York.

Pertinent Testimony

10. Dr. Beryl Robichaud, a Senior Vice President of McGraw Hill, Inc., testified that she had no prior business or professional relationship whatsoever with anyone from Anchor or any of the defendants (pp. 120-2);* that no one from Anchor attempted to influence her deliberations as a member of the Disinterested Quorum (p. 123); and that she made her decision in this case solely on the basis of what she believed to be in the best interests of the shareholders (pp. 124-5). Copies of the foregoing pages of testimony of Dr. Robichaud are annexed hereto as Exhibit B.

11. Mrs. Mary S. O'Connor, a director and member of the Executive and Trust Committees of the Central Home Trust Company, Elizabeth, New Jersey, and one of the first female officers of IBM, testified that she had no prior business or professional relationship whatsoever with anyone from Anchor or any of the defendants (pp. 83-6); that no one from Anchor or any of the defendants attempted to influence her deliberations as a member of the Disinterested Quorum (p. 86); and that she felt under no pressure whatsoever from anyone at Anchor in connection with making her decision (p. 87). Copies of the foregoing pages of testimony of Mrs. O'Connor are annexed hereto as Exhibit C.

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*References in parentheses are to pages of the deposition transcripts.

12. Leon T. Kendall, President of Mortgage Guaranty Insurance Corporation, Milwaukee, Wisconsin, testified that he had no prior business or professional relationship whatsoever with anyone from Anchor or any of the defendants (pp. 217-23); that he had never had any economic relationship of any kind with Mr. Haire (p. 224); that Mr. Haire never attempted to influence his deliberations as a member of the Disinterested Quorum (p. 225); and that he felt under no pressure whatsoever from Mr. Haire with respect to his deliberations as a member of the Disinterested Quorum (p. 225). The sole prior connection that Mr. Kendall had with Anchor Corporation was remote and immaterial; Anchor Corporation had been one of approximately 600 members of a trade association called the Investment Bankers Association which was merged into another association called the Securities Industry Association, of which Mr. Kendall was President (pp. 217-23). Mr. Kendall, in summing up the situation, testified as follows:

> "Q Can you tell us once again, in your own words, the extent of your business relationship or professional relationship, if any, with Mr. Haire prior to the time that you became a director of Fundamental Investors?"
>
> "A I had no business, professional, economic, financial relationships with Mr. Haire. The only relationship that existed was in the Trade Association, which I headed, and of which his company was a member." (p. 226, see also 11-22).

Copies of the foregoing pages of testimony of Mr. Kendall are anenxed hereto as Exhibit D.

13. William J. Stephens, former Chairman and Chief Executive of Jones and Laughlin Steel Corporation, Pittsburgh, Pennsylvania, testified that he had no prior business or professional relationship whatsoever with anyone from Anchor or any of the defendants, with the immaterial exception that he knew the late Harvey Hopkins, one of the defendants, when they had both been in the steel industry, but that he had had no business relationship with Mr. Hopkins at any time subsequent to 1958 or 1959 (pp. 130-5); that no one from Anchor, nor Mr. Hopkins, nor anyone else had attempted to influence his deliberations as a member of the Disinterested Quorum (p. 135); and that he felt under no pressure whatsoever from anyone at Anchor in his deliberations as a member of the Disinterested Quorum (pp. 136-7). Copies of the foregoing pages of testimony of Mr. Stephens are annexed hereto as Exhibit E.

14. Louis F. Laun, Deputy Administrator of the Small Business Administration, Washington, D.C., testified that he had no prior business or professional relationship whatsoever with anyone from Anchor or any of the defendants (pp. 148-51); that no one from Anchor had attempted to influence his deliberations as a member of the Disinterested Quorum (p. 152); and that he felt under no pressure whatsoever from anyone at Anchor with respect to his deliberations as a member of the Disinterested Quorum (p. 152). Copies of the foregoing pages of the testimony of Mr. Laun are annexed hereto as Exhibit F.

Conclusion

On the basis of the Memorandum Decision and Opinion of this Court, and on the basis of the discovery proceedings had herein, the renewed motion to dismiss this action should be granted.

Roger T Wicker

Roger T. Wickers

Sworn to before me this

23rd day of July, 1976.

Martin I Kaminsky

MARTIN I. KAMINSKY
Notary Public, State of New York
No. 30-2023320
Qualified in Nassau County
Certificate filed in New York County
Commission Expires March 30, 1977

Exhibit A to Affidavit of Roger T. Wickers sworn to July 23, 1976 in support of Renewed Motion to Dismiss -- Memorandum Decision and Order dated September 24, 1975, reproduced at p.137A of this appendix.

Exhibit B to Affidavit of Roger T. Wickers sworn to July 23, 1976 in support of Renewed Motion to Dismiss -- Pages 120-125 of Robichaud deposition, reproduced at pp. 904A-909A of this appendix.

Exhibit C to Affidavit of Roger T. Wickers sworn to July 23, 1976 in support of Renewed Motion to Dismiss -- Pages 83-87 of O'Connor deposition, reproduced at pp. 986A-990A of this appendix.

Exhibit D to Affidavit of Roger T. Wickers sworn to July 23, 1976 in support of Renewed Motion to Dismiss -- Pages 217-227 of Kendall deposition, reproduced at pp. 649A-658A of this appendix.

Exhibit E to Affidavit of Roger T. Wickers sworn to July 23, 1976 in support of Renewed Motion to Dismiss -- Pages 130-137 of Stephens deposition, reproduced at pp. 781A-788A of this appendix.

Exhibit F to Affidavit of Roger T. Wickers sworn to July 23, 1976 in support of Renewed Motion to Dismiss -- Pages 148-153 of Laun deposition, reproduced at pp. 1129A-1134A of this appendix.

Affidavit of James C. Sargent
sworn to September 17,1976
in opposition to renewed
motion to dismiss

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------------------------------X

HOWARD M. LASKER, et ano., :

Plaintiffs, :

-against- : 73 Civ. 552 (HFW)

HARRY G. BURKS, JR., et al., : **AFFIDAVIT**

Defendants. :

----------------------------------X

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JAMES C. SARGENT, being duly sworn, deposes and says:

1. I make this affidavit at the request of plaintiffs' attorneys in connection with the motion by defendants to dismiss this action.

2. I was admitted to the Bar in the State of New York in 1940 and have been a practicing attorney since that time, except for service with the armed forces during World War II and as a member of the Securities and Exchange Commission thereafter. In 1955 I was appointed Regional Administrator of the Commission's New York Regional Office. Shortly thereafter, I was appointed a member of the Commission and served in that capacity from June 29, 1956 until October 21, 1960. I have been a member of the faculty of the University of Virginia Law School and have lectured throughout the country in the fields of proxy contests, securities law and corporate law generally.

3. Traditionally in the mutual fund industry, outside directors, known at various times as "unaffiliated" or "disinterested" directors, have not been independent in any meaningful sense. The absence of real independence has resulted from a variety of causes.

Typically, it is the management of a mutual fund which screens and selects outside directors. Management thereby effectively retains the power to recruit persons friendly to itself to serve as outside directors.

True independence is further negated by the pervasive control exercised by investment advisers over the investment and management functions of mutual funds. This pattern of pervasive control has existed from the very inception of the mutual fund industry and was largely responsible for many of the serious abuses which led to the enactment of the Investment Company Act.

Still another reason for the lack of independence on the part of the outside directors of a mutual fund is management's control of the fund's proxy machinery. Mutual funds are characterized by extreme diffusion of stock ownership. Such diffusion of a company's stock bears a direct relationship to the importance of the proxy machinery in the election of corporate directors -- the more widely diffused the stock ownership, the greater the importance of the proxy machinery.

For example, a typical mutual fund has tens of thousands of shareholders. There are few, if any, large blocks of stock. The average shareholder's holdings in the fund are proportionately insignificant in relation to the fund's total outstanding shares. Management, because of its control of the proxy machinery, has the power to nominate a slate of directors which invariably is elected without opposition. It costs many thousands of dollars to clear proxy material with the SEC and to make mailings to tens of thousands of fund stockholders. To defray such expense, management has at its disposal the corporate treasury. However, for an individual shareholder of a mutual fund, or for a dissident, truly "independent", outside director, a contested election in opposition to management is economically unfeasible and unrealistic since the enormous costs involved would have to be paid out of his or her own pocket. The outside directors' economic investment in the fund, if any, is so slight in relative terms that the cost of filing proxy materials and soliciting shareholders is prohibitive.

Consequently, proxy contests for control of mutual funds are virtually nonexistent. It has been, and remains, a fact in the mutual fund industry that control of the fund's proxy machinery is tantamount to control of the fund itself. The power to nominate directors in a mutual fund is tantamount to the power to elect them. The power to refuse to renominate a sitting director is tantamount to the power to remove him from office.

4. If a quorum of outside directors, comprising a minority of a mutual fund's board, is asked to make a determination on behalf of the fund and that determination might adversely affect the economic interests of the remaining directors, who comprise an absolute majority of the fund's board, and who also thereby control the fund's proxy machinery, the minority directors, in my opinion, cannot be considered truly "independent" in any meaningful sense. Under such circumstances, whether or not the minority directors attempt to make their determination in good faith, the

fact nevertheless remains that the majority directors would have the unchallengeable power to nominate, in connection with the fund's next stockholders' meeting, a slate of directors which would exclude the minority directors and thereby, for all intents and purposes, terminate their directorships.

James C Sargent
James C. Sargent

Sworn to before me this
17th day of September 1976.

Anthony L. Tersigni
Notary Public

ANTHONY L. TERSIGNI
Notary Public, State of New York
No. 30-3955350
Qualified in Nassau County
Certificate filed in New York County
Commission Expires March 30, 1977

Affidavit of Anthony L.
Tersigni, sworn to
September 20,1976, in
opposition to renewed
motion to dismiss

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- x

HOWARD M. LASKER, et ano., :

Plaintiffs, :

-against- : 73 Civ. 552 (HFW)

HARRY G. BURKS, JR., et al., : **AFFIDAVIT**

Defendants. :

- x

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

ANTHONY L. TERSIGNI, being duly sworn, deposes and says:

1. I am a member of the firm of Aranow, Brodsky, Bohlinger, Benetar & Einhorn, attorneys for plaintiffs.

2. I respectfully submit this affidavit to place before the Court, in connection with defendants' motion to dismiss, certain documents and information obtained in the course of discovery proceedings.

3. Annexed to this affidavit are copies of the following documents furnished to us by defendants during discovery:

Exhibit No.	Document
"A"	Minutes of Fund's board meeting of July 28, 1971.*
"B"	Minutes of Fund's board meeting of November 17, 1971.

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*Minutes of board meetings were furnished to us in excerpted form and are submitted as received, including blank pages.

Exhibit No.	Document
"C"	Minutes of Fund's board meeting of April 26, 1972.
"D"	Minutes of Fund's board meeting of June 27, 1973.
"E"	Minutes of Fund's board meeting of July 25, 1973.
"F"	Minutes of Fund's board meeting of March 27, 1974.
"G"	Schedule of remuneration of minority directors for services as directors of the Anchor group of mutual funds.
"H"	Fund Prospectus, dated May 1, 1975.
"I"	Article "TWELFTH" of Fund's certificate of incorporation.

4. As part of discovery we were also furnished with certain information which counsel for the Fund communicated to us orally in response to a letter request. In this connection we were advised that as of January 1, 1975 the Fund had no beneficial owners holding more than one percent of its outstanding stock.

5. We were further advised that in 1967 Seward & Kissel represented the Fund in two actions unrelated to the present action and was retained by the Fund in connection with this action on March 12, 1973.

Anthony L. Tersigni
ANTHONY L. TERSIGNI

Sworn to before me this
20th day of September 1976.

Lynn F. Zuckerman
Notary Public

LYNN F. ZUCKERMAN
Notary Public, State of New York
No. 31-4624812
Qualified in New York County
Commission Expires March 30, 1978

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Exhibit A to Affidavit of Anthony L. Tersigni sworn to September 20, 1976.
Extract of minutes of meeting of Board of Directors of Fundamental
Investors Inc., July 28, 1971

FUNDAMENTAL INVESTORS, INC.

MINUTES OF MEETING OF BOARD OF DIRECTORS
JULY 28, 1971

The regular meeting of the Board of Directors of Fundamental Investors, Inc. was held on the 28th day of July, 1971, at the office of the Fund, Westminster at Parker, Elizabeth, New Jersey, at 1:30 P. M.

There were present:

Messrs. Harry G. Burks, Jr.
Edward B. Burr
John R. Haire
Harvey C. Hopkins
S. P. Hutchison
Donald L. Kemmerer
A. S. Mike Monroney
Charles F. Phillips
Jeptha H. Wade

constituting the entire Board of Directors.

There were also present Mr. Thomas A. Martin, Executive Vice President of the Fund, Mr. Roger T. Wickers, Vice President and Secretary of the Fund, and Douglas B. Steimle, Esquire, of Counsel to the Fund.

The President then referred to the questions raised by the stockholders of the Fund at the annual meeting in June with respect to the composition of the Board and the procedures for nominating directors. He stated that Dr. Harry G. Burks, Jr. would reach mandatory retirement age prior to the next election of directors and suggested that it might be appropriate at this time to appoint a committee to review the make-up of the Board, consider qualifications for directors, and to recommend possible candidates to the Board for its consideration. Following discussion, on motion duly made and seconded, a Special Committee consisting of Dr. Harry G. Burks, Jr., as Chairman, Dr. Charles F. Phillips, and Mr. John R. Haire, the President of the Fund, was appointed for that purpose.

175 A

Exhibit B to Affidavit of Anthony L. Tersigni sworn to September 20, 1976.
Extract of minutes of meeting of Board of Directors of Fundamental Investors Inc., November 17, 1971

FUNDAMENTAL INVESTORS, INC.

MINUTES OF MEETING OF BOARD OF DIRECTORS
NOVEMBER 17, 1971

The regular meeting of the Board of Directors of Fundamental Investors, Inc. was held on the 17th day of November, 1971, at 1:30 P. M., at the office of the Fund, Westminster at Parker, Elizabeth, New Jersey.

There were present:

Messrs. Harry G. Burks, Jr.
Edward B. Burr
John R. Haire
Harvey C. Hopkins
S. P. Hutchison
Donald L. Kemmerer
A. S. Mike Monroney
Charles F. Phillips
Jeptha H. Wade

constituting the entire Board of Directors.

Also present was Douglas B. Steimle, Esquire, of Counsel to the Fund.

Mr. Edward B. Burr, Chairman of the Board, called the meeting to order and presided. He stated that the meeting would be temporarily in executive session and that, in the absence of the Secretary of the Fund, the President, Mr. John R. Haire, would act as secretary of the meeting.

A copy of the minutes of the regular meeting of the Board held October 20, 1971, having been sent to each director, on motion duly made, seconded and carried, the reading of such minutes was waived and the minutes were approved.

The Chairman of the Board stated that, at the meeting of the Board of Directors held in October, Mr. Thomas A. Martin, President of the Investment Management Division of Anchor Corporation, and Mr. Louis F. Laun, former Vice President of Celanese Corporation, had been proposed as candidates for election to the Board of Directors, and it was now in order to consider and take action on the proposal. A discussion ensued among the directors of the proposal to elect Messrs. Martin and Laun as directors of the Fund. Thereupon, on motion duly made, seconded and unanimously carried, it was

RESOLVED, that pursuant to Section 1 of Article IV of the By-Laws of the Fund, the number of directors constituting the Board of Directors be and hereby is fixed at eleven, effective immediately; and further

RESOLVED, that Mr. Thomas A. Martin be and he hereby is elected a director of this Fund, effective immediately, to hold office in accordance with the By-Laws; and further

RESOLVED, that Mr. Louis F. Laun be and he hereby is elected a director of this Fund, effective immediately, to hold office in accordance with the By-Laws.

Messrs. Martin and Laun were then called into the meeting after which the following persons entered: Mr. Melvin Intriligator, Executive Vice President (Operations) of the Fund; Mr. Thomas C. Jones, Vice President of the Fund; Mr. Arthur M. Kesselhaut, Treasurer of the Fund; and the following officers of the Investment Management Division of Anchor Corporation: Mr. Edward N. Button, Executive Vice President; Mr. James J. McGonigle and Mr. N. Andre Boschert, Vice Presidents; and Messrs. Bryant M.Hanley, Jr. and Ronald L. Welburn, Vice Presidents and Fund Administrators.

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Exhibit C to affidavit of Anthony L. Tersigni sworn to September 20,1976
Extract of minutes of meeting of Board of Directors of Fundamental
Investors, Inc. April 26,1972

FUNDAMENTAL INVESTORS, INC.

MINUTES OF MEETING OF BOARD OF DIRECTORS
APRIL 26, 1972

The regular meeting of the Board of Directors of Fundamental Investors, Inc. was held on the 26th day of April, 1972, at 1:30 P. M., at the office of the Fund, Westminster at Parker, Elizabeth, New Jersey.

There were present:

Messrs. Harry G. Burke, Jr.
Edward B. Burr
John R. Haire
Harvey C. Hopkins
S. P. Hutchison
Donald L. Kemmerer
Louis F. Laun
Thomas A. Martin
Jeptha H. Wade

constituting a quorum of the Board of Directors.

Also present were Mr. Roger T. Wickers, Vice President and Secretary of the Fund, and Douglas B. Steimle, Esq., of Counsel to the Fund.

Dr. Burks then reviewed the activities of the Committee in seeking qualified and experienced candidates for director. Dr. Burks stated that it would be necessary for the Board to designate two additional nominees to replace himself and Mr. Monroney since neither would be eligible for reelection as director. He stated that the Committee had met and talked with several potential candidates as a result of which it was the recommendation of the Committee that Mrs. Mary S. O'Connor be designated as a nominee for election as a director of the Fund at the 1972 annual meeting of stockholders. He stated that Mrs. O'Connor is a director and member of the Executive and Trust Committees of the Central Home Trust Company of Elizabeth, New Jersey, and a former Assistant Vice President of International Business Machines Corporation.

Dr. Burks also reviewed with the directors the qualifications of Hobart Taylor, Jr., a partner of the law firm of Dawson, Quinn, Riddell, Taylor & Davis, Washington, D. C., a former Associate Counsel to the President of the United States, and currently a director of The Great Atlantic & Pacific Tea Co., Standard Oil Company (Ohio), and Westinghouse Electric Corporation. He stated that it was the recommendation of the Committee that Mr. Taylor also be designated as a nominee for election as a director of the Fund at the 1972 annual meeting of stockholders.

Following discussion and on motion duly made, seconded and carried, it was

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RESOLVED, that Mrs. Mary S. O'Connor and Mr. Hobart Taylor, Jr. be and each of them hereby is designated as a nominee for election as director of the Fund at the 1972 annual meeting of stockholders.

180 A

Exhibit D to affidavit of Anthony L. Tersigni sworn to September 20, 1976
Extract of minutes of meeting of Board of Directors of Fundamental Investors, Inc. June 27, 1973

FUNDAMENTAL INVESTORS, INC.

MINUTES OF MEETING OF BOARD OF DIRECTORS
JUNE 27, 1973

The regular meeting of the Board of Directors of Fundamental Investors, Inc. was held on the 27th day of June, 1973, at 1:30 P. M., at the office of the Fund, Westminster at Parker, Elizabeth, New Jersey.

There were present:

Edward B. Burr
John R. Haire
Harvey C. Hopkins
Stanley P. Hutchison
Donald L. Kemmerer
Louis F. Laun
Thomas A. Martin
Mary S. O'Connor
Charles F. Phillips
Jeptha H. Wade

constituting a quorum of the Board of Directors.

There were also present Mr. Roger T. Wickers, Vice President and Secretary of the Fund; Mr. Arthur M. Kesselhaut, Treasurer of the Fund; Douglas B. Steimle, Esq., of Counsel to the Fund; and the following officers of the Investment Division of Anchor Corporation: Mr. James J. McGonigle, Executive Vice President; Messrs. Ronald L. Welburn and Frank I. Smith, Vice Presidents, and Mr. Ira N. Ross, Assistant Vice President.

Mr. Edward B. Burr, Chairman of the Board, called the meeting to order and presided, and Mr. Roger T. Wickers, Vice President and Secretary of the Fund, acted as secretary of the meeting.

A copy of the minutes of the regular meeting of the Board held May 23, 1973, having been sent to each director, on motion duly made, seconded and carried, the reading of such minutes was waived and the minutes were approved.

The Chairman of the Board then called upon Dr. Donald L. Kemmerer, Chairman of the Directors' Qualification Committee. Dr. Kemmerer reported to the Board on the deliberations of the Committee. He stated that the Committee had discussed several potential candidates and had met and talked with William J. Stephens, former President and Chief Executive Officer of Jones and Laughlin Corporation, as a result of which it was the recommendation of the Committee that Mr. Stephens be designated as a nominee for election as a director of the Fund at the 1973 Annual Meeting of Stockholders.

Following a discussion of Mr. Stephens' qualifications, it was on motion duly made, seconded and carried

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RESOLVED, that Mr. William J. Stephens be and he hereby is designated as a nominee for election as director of the Fund at the 1973 Annual Meeting of Stockholders.

182 A

J.

Exhibit E to affidavit of Anthony L. Tersigni sworn to September 20, 1976
Extract of minutes of meeting of Board of Directors of Fundamental
Investors, Inc. July 25, 1973

FUNDAMENTAL INVESTORS, INC.

MINUTES OF MEETING OF BOARD OF DIRECTORS
JULY 25, 1973

The regular meeting of the Board of Directors of Fundamental Investors, Inc. was held on the 25th day of July, 1973, at 1:30 P. M., at the office of the Fund, Westminster at Parker, Elizabeth, New Jersey.

There were present:

Edward B. Burr
John R. Haire
Harvey C. Hopkins
Stanley P. Hutchison
Donald L. Kemmerer
Louis F. Laun
Thomas A. Martin
Mary S. O'Connor
Charles F. Phillips
Hobart Taylor, Jr.
Jeptha H. Wade

constituting the entire Board of Directors.

Also present were Mr. Roger T. Wickers, Vice President and Secretary of the Fund, Douglas B. Steimle, Esq., of Counsel to the Fund, and Mr. James J. McGonigle, Executive Vice President of the Investment Division of Anchor Corporation.

Mr. Edward B. Burr, Chairman of the Board, stated that the meeting would be temporarily in executive session and that Mr. Wickers, Secretary of the Fund, would act as Secretary of the meeting.

Dr. Donald L. Kemmerer reported to the Board on the activities of the Directors' Qualification Committee in seeking qualified and experienced candidates for director. He stated that after meeting and talking with a number of potential candidates it was the recommendation of the Committee that Miss Beryl Robichaud be designated as a nominee for election as a director of the Fund at the annual meeting to be held in September. He reviewed the qualifications and experience of Miss Robichaud and stated that she is presently Senior Vice President (Corporate Management Information Services) of McGraw-Hill, Inc., the author of two books in the field of business management and co-author of a book in the environmental field. Mrs. O'Connor reported that she had known Miss Robichaud for many years and joined in the recommendation of Miss Robichaud.

Following discussion and on motion duly made, seconded and carried, it was

RESOLVED, that Miss Beryl Robichaud be and she hereby is designated as a nominee for election as a director of the Fund at the annual meeting of stockholders to be held on September 26, 1973.

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Exhibit F to affidavit of Anthony L. Tersigni sworn to September 20,1976
Extract of minutes of meeting of Board of Directors of Fundamental Investors, Inc. Dated March 27,1974

FUNDAMENTAL INVESTORS, INC.

MINUTES OF MEETING OF BOARD OF DIRECTORS
MARCH 27, 1974

The regular meeting of the Board of Directors of Fundamental Investors, Inc. was held at the offices of the Fund, Westminster at Parker, Elizabeth, New Jersey, on Wednesday, March 27, 1974, at 1:00 P. M.

There were present:

Edward B. Burr
John R. Haire
S. P. Hutchison
Donald L. Kemmerer
Louis F. Laun
Thomas A. Martin
Mary S. O'Connor
Charles F. Phillips
Beryl Robichaud
William J. Stephens

constituting the entire Board of Directors.

There were also present Mr. Melvin Intriligator, Executive Vice President—Operations of the Fund; Mr. Roger T. Wickers, Vice President and Secretary of the Fund; Mr. Arthur M. Kesselhaut, Treasurer of the Fund; Myles Whalen, Jr., Esq., of Counsel to the Fund; and Messrs. James J. McGonigle, N. Andre Boschert, Frank I. Smith and Ira N. Ross, respectively Executive Vice President, Senior Vice President, Vice President and Assistant Vice President of the Investment Division of Anchor Corporation.

Mr. Edward B. Burr, Chairman of the Board, called the meeting to order and presided, and Mr. Roger T. Wickers, Vice President and Secretary of the Fund, acted as Secretary of the meeting.

A copy of the minutes of the regular meeting of the Board held February 22, 1974, having been sent to each director, on motion duly made, seconded and carried, the reading of such minutes was waived and the minutes were approved.

The Chairman of the Board then called upon Dr. Donald L. Kemmerer, Chairman of the Directors' Qualification Committee. Dr. Kemmerer reported on the activities of the Committee in seeking qualified candidates for director. He stated it was the Committee's recommendation that Mr. Leon T. Kendall, whom the directors had met at luncheon earlier in the day, be designated as a management nominee for election as a director of the Fund at the 1974 Annual Meeting of Stockholders. Dr. Kemmerer reviewed Mr. Kendall's qualifications and previous positions as Vice President and Economist of the New York Stock Exchange, President of the Association of Stock Exchange Firms and the Securities Industry Association, and commented on Mr. Kendall's most recent election as President and Chief Executive Officer of Mortgage Guaranty Insurance Corporation, the nation's largest private insurer of conventional home mortgages.

After discussion of the qualifications of Mr. Kendall and on motion duly made and seconded (Messrs. Haire, Burr, Hutchison and Martin not voting), the following resolutions were adopted:

> RESOLVED, that the recommendation of the Directors' Qualification Committee that Mr. Leon T. Kendall be designated as a nominee for election as a director of the Fund at the 1974 Annual Meeting of Stockholders be and hereby is accepted and approved

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Exhibit G to Affidavit of Anthony L. Tersigni sworn to September 20, 1976.
Compensation Schedules of Minority Directors

LOUIS F. LAON

1	2	3	4	5	6	7	8
	FUNDAMENTAL INVESTORS						
YEAR	SALARY	REGULAR MEETINGS	BROKERAGE COMM	AUDIT COMM	TOTAL	ALL OTHER FUNDS	TOTAL
1975	3000	2490	600	200	6290	4975	11175
1974	3000	2200	600	—	5800	4950	10750
1973	3000	2000	1000	—	6000	5175	11175
1972	3000	2200	—	—	5200	4275	9475
1971	375	400	—	—	775	625	1400

MARY S. O'CONNOR

1	2	3	4	5	6	7		
			FOUNDATION	INVESTORS				
YEAR	SALARY	REGULAR MEETINGS	BROKERAGE COMM	CONTRACT COMM	CORPORATE RESPONSIBILITY	N.I.R COMM	TOTAL	ALL OTHER FUNDS
1975	3000	2600	400	600	200	200	7000	6000
1976	3000	2200	600	200	200	200	6400	5625
1977	3000	2250	1000	—	—	—	6250	5400
1978	1500	1200	—	—	—	—	2700	2250

WILLIAM J. STEVENS

1	2	3	4	5	6	7	8	9
		FUNDAMENTAL INVESTORS						
YEAR	SALARY	REGULAR MEETINGS	CORPORATE RELATIONS COMM	CONTRACT COMM.	AUDIT COMM.	TOTAL	ALL OTHER FUNDS	TOTAL
1975	3000	2800	200	600	400	7000	5175	12175
1974	3000	2200	200	—	—	5400	4500	9900
1973	750	600	—	—	—	1350	1125	2475

BERYL ROBICHAUD

1	2	3	4	5	6	7	8
	ENVIRONMENTAL INVESTORS						
YEAR	SALARY	REGULAR MEETINGS	AUDIT COMM	DIRECTORS QUALIFICATION	TOTAL	ALL OTHER FUNDS	TOTAL
1975	3500	2400	200	—	6000	4800	10800
1976	3000	2200	—	200	5400	4500	9900
1977	750	600	—	—	1350	1125	2475

National 44-884 EYE EASE
42-764 20/20 BUFF
Made in U.S.A.

LEON J. KENDALL

YEAR	FUNDAMENTAL INVESTORS SALARY	REGULAR MEETINGS	CONTRACT COMM	BROKERAGE COMM	TOTAL	ALL OTHER FUNDS	TOTAL
1974	1500	1200	—	—	2700	2250	4950
1975	3000	2600	400	200	6200	4875	11075

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Exhibit H to Affidavit of Anthony L. Tersigni sworn to September 20, 1976.
Prospectus of Fundamental Investors, Inc. May 1, 1975 p.1

FUNDAMENTAL INVESTORS, INC.

PROSPECTUS/MAY 1, 1975

Westminster at Parker
Elizabeth, New Jersey 07207
Telephone—201—354-1770

FUNDAMENTAL INVESTORS, INC. (the "Fund"), is a diversified open-end management investment company. The Fund's investment objective is to increase its shareholders' capital and income return over the years. It seeks to achieve this objective by investing in a diversified selection of common stocks, or securities convertible into common stocks, and to a limited extent in preferred stocks, bonds and similar securities. There is, of course, no assurance that this objective can be attained. At December 31, 1974, approximately 141,000 shareholders owned 104,177,933 shares of the Fund having an aggregate net asset value of $509,323,710.

Anchor Corporation serves as investment adviser (see "Investment Adviser", page 8) and as principal underwriter (see "Principal Underwriter", page 7) to the Fund and to the other funds in the Anchor Group of Mutual Funds.

Shares of the Fund are offered to the public at prices which are determined once daily at the net asset value per share plus a sales charge of 8¾% (maximum) of the offering price which is equivalent to approximately 9.6% of the net amount of the offering price invested in the Fund, scaled down on purchases of $10,000 or more to approximately 1% of the offering price (minimum) depending upon the size of purchase (see "How Shares May Be Purchased", page 4). Investments of $100 or more will be accepted by the principal underwriter from dealers. Initial investments of $100 or more and subsequent investments of $25 or more will be accepted where payments are made directly to the Custodian Bank (see "Open Account", page 5). Shares are redeemed by the Fund at net asset value without any charge (see "Right to Have Shares Redeemed or Repurchased", page 9).

THESE SECURITIES HAVE NOT BEEN APPROVED OR DISAPPROVED BY THE SECURITIES AND EXCHANGE COMMISSION NOR HAS THE COMMISSION PASSED UPON THE ACCURACY OR ADEQUACY OF THIS PROSPECTUS. ANY REPRESENTATION TO THE CONTRARY IS A CRIMINAL OFFENSE.

Shareholders should retain this Prospectus for future reference.

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Exhibit I to affidavit of Anthony L. Tersigni Article twelfth,
Certificate of Incorporation of Fundamental Investors, Inc.

to the inspection of the stockholders, and no stockholder shall have any right to inspect any account, book or document of the Corporation except as conferred by statute or as authorized by the Board of Directors.

TWELFTH: Each director and officer (and his heirs, executors, and administrators) shall be indemnified by the Corporation against reasonable costs and expenses incurred by him in connection with any action, suit or proceeding to which he may be made a party by reason of his being or having been a director or officer of the Corporation, except in relation to any action, suit or proceeding in which he has been adjudged liable because of negligence or misconduct in the performance of duty, which shall be deemed to include willful misfeasance, bad faith, gross negligence or reckless disregard of the duties involved in the conduct of his office. In the absence of an adjudication on the merits in favor of the director or officer, or which otherwise wholly absolves him of liability to the Corporation or its stockholders for such negligence or misconduct, within the meaning thereof as used herein, or in the event of a settlement, each director and officer (and his heirs, executors and administrators) shall be indemnified by the Corporation against payments made, including reasonable costs and expenses, provided that such indemnity shall be conditioned upon the prior determination by a resolution of two-thirds of those members of the Board of Directors of the Corporation who are not involved in the action, suit or proceeding that the director or officer has no liability by reason of such negligence or misconduct, within the meaning thereof as used herein, or if a majority of the members of the Board of Directors of the Corporation are involved in the action, suit or proceeding, that such determination shall have been made by a written opinion of independent counsel (who may be counsel to the Corporation). Amounts paid in settlement shall not exceed costs, fees and expenses which would have been reasonably incurred if the action, suit or proceeding had been litigated to a conclusion. Such a determination by the Board of Directors or by independent counsel, and the payments of amounts by the Corporation on the basis thereof shall not prevent a stockholder from challenging such indemnification by appropriate legal proceedings on the grounds that the person indemnified was liable to the

Corporation or its security holders by reason of such negligence or misconduct, within the meaning thereof as used herein. The foregoing rights and indemnification shall not be exclusive of any other rights to which the officers and directors may be entitled according to law.

THIRTEENTH: The Corporation reserves the right to amend, alter, change or repeal any provisions contained in this certificate, in the manner now or hereafter prescribed by the statute; and all rights herein conferred upon the stockholders are granted subject to this reservation.

We, the undersigned, being all of the incorporators named in the original certificate of incorporation of Fundamental Investors, Inc., a corporation organized in pursuance of the act of the legislature of the State of Delaware, entitled "An Act providing a General Corporation Law" (approved March 10,1899), and the acts amendatory thereof and supplemental thereto, the certificate of incorporation of which was duly filed in the Office of the Secretary of State of Delaware the seventeenth day of October, A.D. 1932, and recorded in the Recorder's Office at Wilmington, New Castle County, Delaware, in Corporation Record F, Vol. 40, Page 94, etc., the seventeenth day of October, A.D. 1932, no part of the capital of said corporation having been paid, do hereby, pursuant to the provisions of Section 25 of said General Corporation Law, amend said certificate of incorporation so that the same shall read as hereinbefore set forth, hereby declaring and certifying that the facts herein stated are true, and accordingly have hereunto set our respective hands and seals this 10th day of December, A.D. 1932.

In the presence of:

C. S. PEABBLES (L.S.)
L. E. GRAY (L.S.)
L. H. HERMAN (L.S.)

HAROLD E. GRANTLAND

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Contract between Fundamental Investors, Inc. and Anchor Corporation dated November 30,1973. paragraphs"Second"-"Fourth"

Second: Anchor shall furnish the services of persons competent to perform all executive functions for the Fund, together with such clerical, bookkeeping and other personnel as shall be required to provide effective corporate administration for the Fund, or as may otherwise be reasonably required in the ordinary conduct of its business. Anchor shall pay the compensation of all such persons, and agrees that if any such persons shall be elected as officers of the Fund, they shall serve as such without additional compensation from the Fund. Anchor shall also, at its expense, provide the Fund with adequate office space (which may be in the offices of Anchor) and all necessary office equipment, and shall pay the cost of telephone service, heat, utilities, stationery, supplies and similar miscellaneous office expenses of the Fund. The Fund shall pay or provide for the payment for its own account of all its expenses not assumed by Anchor as hereinbefore provided; which expenses shall include, without limitation, taxes, brokerage commissions, compensation and expenses of directors, legal and auditing expenses, custodian's and transfer agent's fees and expenses, the cost of issuing stock of the Fund, and the expense of printing and mailing reports and notices to its shareholders.

Third: Anchor agrees to use its best efforts in the furnishing of investment supervisory and corporate administrative services hereunder, and shall at all times maintain a staff of officers and other trained personnel for the purpose of performing its obligations under this agreement. Anchor may, at its expense, employ other persons to furnish administrative services to the Fund or to furnish to Anchor statistical and other factual information, advice regarding economic factors and trends, information with regard to technical and scientific developments, and such other information and assistance as Anchor may desire.

Fourth: Anchor agrees that in all matters relating to the administration of the Fund and the supervision of its investments, it will act in conformity with the certificate of incorporation and by-laws of the Fund, with the statements of policy contained in the registration statements and prospectuses of the Fund, and with the instructions and directions of the Board of Directors of the Fund. Each of the parties agrees that in all matters relating to the performance of this agreement it will conform to and comply with the requirements of the Investment Company Act of 1940 and all other applicable federal or state laws and regulations. Nothing herein contained shall be deemed to require the Fund to take any action contrary to its certificate of incorporation or by-laws or to any applicable statute or regulation, or to relieve or deprive the Board of Directors of the Fund of its responsibility for and control of the conduct of the affairs of the Fund.

Fifth: As full compensation for all services rendered and expenses assumed by Anchor hereunder, the Fund agrees to pay to Anchor, and Anchor agrees to accept, an annual management fee based upon the average net asset value of the Fund, as follows:

On that portion of such average net assets which shall not exceed $150,000,000, an amount equal to .5 of 1% (½ of 1%) of such average net assets; plus

On that portion of such average net assets which shall exceed $150,000,000 and shall not exceed $400,000,000, an amount equal to .45 of 1% of such average net assets; plus

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Chart showing Membership of Directors Qualifications Committee

Directors Qualifications Committee --- Membership

July 28, 1971 --- Harry G. Burks, Jr., Chairman
Charles F. Phillips and John R. Haire

June 28, 1972 --- D. L. Kemmerer, Chairman
Harvey C. Hopkins and John R. Haire

September 26, 1973 --- D. L. Kemmerer, Chairman
Beryl Robichaud and John R. Haire

June 26, 1974 --- D. L. Kemmerer, Chairman
Beryl Robichaud and John R. Haire

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Extracts of minutes of Meeting of Board of Directors of Fundamental Investors, Inc. of July 24,1974

FUNDAMENTAL INVESTORS, INC.

MINUTES OF MEETING OF BOARD OF DIRECTORS
JULY 24, 1974

The regular meeting of the Board of Directors of Fundamental Investors, Inc. was held at the offices of the Fund, Westminster at Parker, Elizabeth, New Jersey, on Wednesday, July 24, 1974, at 1:30 P. M.

There were present:

Edward B. Burr
John R. Haire
S. P. Hutchison
Donald L. Kemmerer
Leon T. Kendall
Louis F. Laun
Thomas A. Martin
Mary S. O'Connor
Charles F. Phillips
Beryl Robichaud
William J. Stephens

constituting the entire Board of Directors.

There were also present Mr. Melvin Intriligator, Executive Vice President—Operations of the Fund; Mr. Roger T. Wickers, Vice President and Secretary of the Fund; Mr. Arthur M. Kesselhaut, Treasurer of the Fund; Mr. James S. Little, Assistant Vice President and Assistant Secretary of the Fund; Douglas B. Steimle, Esq., of Counsel to the Fund; and the following officers of the Investment Division of Anchor Corporation: Mr. James J. McGonigle, Executive Vice President; Messrs. Ronald L. Welburn, Frank I. Smith, Jonathan P. White, Leonard Brooks, Jr. and Ira Ross, Vice Presidents.

Mr. Edward B. Burr, Chairman of the Board, called the meeting to order and presided, and Mr. Roger T. Wickers, Vice President and Secretary of the Fund, acted as Secretary of the meeting.

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The Secretary referred to the settlement between the Fund and Goldman, Sachs &
Co. executed on July 9, 1974, a copy of which had previously been sent to each director,
as a result of which the Fund's suit against Goldman, Sachs & Co. was settled and dis-
continued. He reviewed and discussed the terms of the settlement pursuant to which the
Fund sold the notes (which had been purchased by the Fund in 1969 for $18,687,500 and
valued by the Board of Directors of the Fund at $2,000,000 since February 24, 1971,
to Goldman, Sachs & Co. for $5,250,000 in cash, representing 26.25% of the face value
of the notes plus 73.75% of such amount or other consideration, if any, which Goldman,
Sachs & Co. or any subsequent assignee may receive upon such notes in the reorganiza-
tion of the railroad.

The Secretary then discussed the Lasker v. Burks suit against the Fund, its directors and Anchor Corporation arising out of the Fund's purchase of Penn Central Transportation Company commercial paper, and referred to the motion granted by the Court staying further proceedings in that suit pending the outcome of the Fund's suit against Goldman, Sachs & Co. He stated that because the Fund's suit against Goldman, Sachs & Co. had been settled, the stay granted by the Court in the Lasker action would expire twenty days following the settlement of the suit against Goldman, Sachs & Co.

The Secretary said that at the time the Board of the Fund determined to commence action against Goldman, Sachs & Co. it reserved whatever rights it might have against Anchor Corporation until the final outcome of the Goldman, Sachs case. He stated that Messrs. Haire, Burr, Hutchison, Phillips and Kemmerer, among others, were named as defendants in the Lasker suit and that Mrs. O'Connor, Miss Robichaud, and Messrs. Kendall, Laun and Stephens, not being directors at the time of the Penn Central transaction, were not named as defendants.

The Board then discussed the matter following which the Board determined that the five directors who are not named as defendants in the Lasker suit and who constitute a quorum of the Board should make the decision, after consulting with independent counsel, as to what further action, if any, the Fund should take.

The Secretary stated that Judge Stanley H. Fuld, former Chief Judge of the Court of Appeals of the State of New York, had indicated his availability to consult with and advise the directors if they so desired. A discussion ensued among the five directors following which the Secretary was instructed to contact Judge Fuld and request that he review all relevant aspects of the Fund's purchase of Penn Central commercial paper, the case against Goldman, Sachs & Co., and the Lasker complaint, with a view towards meeting with the five directors on September 25th, prior to the Board meeting, for a review of his opinion as to what further action, if any, the Fund should pursue.

PTB: Exhibit 19 for I.D.
R. Bergin
2-26-76

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Seward & Kissel Memorandum
Dated January 6, 1975

SEWARD & KISSEL

January 6, 1975

Memorandum to Mr. Leon T. Kendall
Mr. Louis F. Laun
Mrs. Mary S. O'Connor
Miss Beryl Robichaud
Mr. William J. Stephens

Fundamental Investors, Inc.

This memorandum is intended to respond to the Board's inquiry by outlining the procedures which would have to be followed and the problems which might arise in case the Board reached the decision to terminate the Agreement (the "Agreement") for Investment Supervisory and Corporate Administrative Services between Fundamental Investors, Inc. (the "Fund") and Anchor Corporation.

1. The Board of Directors of the Fund may terminate the Agreement at any time, without penalty, on 60 days' written notice to Anchor, under the terms of the Agreement and of Section 15(a)(3) of the Investment Company Act of 1940 (the "Act"). Aside from termination, the Board could allow the Agreement to

lapse by declining to approve renewal for the annual period commencing May 1, 1975. Even in such event, however, it would be advisable to give Anchor at least 60 days advance notice to avoid a claim of breach of the Agreement by the Fund.

2. If the Board were to exercise its right to terminate the Agreement, it would have to consider whether it should exercise that right with respect to the agreements with the other six funds in the Anchor Group. The Board might decide to terminate the agreements for some but not all of the funds in the Group, although it would have to be able to offer adequate justification for such a decision.

3. The Board would have to select a new investment adviser willing and able to furnish the Fund with investment supervisory and corporate administrative services for an acceptable fee.

4. If the Board were to serve notice on Anchor of intention to terminate the Agreement before a new investment adviser was selected and agreed to serve, the Fund would have to suspend the offering of shares for sale to the public until the selection was made, since the prospectus would be deficient if it did not identify the proposed new investment adviser and describe the new investment advisory agreement. For this reason, notice of termination would in any event not be given until a new adviser had been selected.

5. Following selection of a new adviser, the Board would have to call a meeting of the shareholders of the Fund, prepare and clear proxy materials with the Securities and Exchange Commission and submit the new investment advisory agreement to the shareholders at such meeting. Under the certificate of incorporation of the Fund and Section 15(a) of the Act, the agreement with the new adviser could not become effective until approved by the holders of a majority of the outstanding shares of the Fund.

6. It is possible that some shareholders of the Fund, in disagreement with the Board's decision to terminate the historic relationship with Anchor Corporation, may contest the selection by the Board and may even nominate their own slate of directors for election at the meeting. It is also possible that a substantial number of shares of the Fund would be redeemed due to, or following the results of, such a proxy contest. The possibility of such a contest might make it more difficult for the Board to find an established investment adviser willing to assume the responsibility.

7. Preparing, filing and mailing proxy statements, holding a stockholders' meeting, amending registration statements with the SEC and all the states where the Fund is registered would impose significant additional expenses on the Fund. Similar expenses would be imposed on the other funds in the Anchor Group if their agreements were also terminated.

8. If the Board were to terminate the agreements with each fund in the Anchor Group, it might find itself in the position of having its choice of a new adviser approved by some of the funds in the Group but rejected

by one or more of the others, thus requiring the Board to repeat the process of recommending another adviser until each fund had approved the selection of a new adviser.

9. If the period required for approval of the new adviser exceeded the 60 day notice period under the Agreement or if Anchor ceased to render services during such period, the Board would have to assume full responsibility for administration of the Fund, including portfolio transactions, accounting, legal, regulatory and general corporate matters. The Board would probably have to retain additional employees or one or more service companies to undertake administrative services, since Anchor would no longer be furnishing employees for this purpose. The Fund would also have to incur office expenses which are borne by Anchor under the Agreement. During the transition period prior to the shareholders' approval of the new adviser, the Board would not be authorized to retain an invest-

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ment adviser but would have to rely on employees of the Fund in making portfolio decisions. The lack of a full time, professional investment adviser during this period might, under changing market conditions, result in portfolio losses for the Fund.

Eugene P. Souther

United States District Court
Southern District of New York

Howard M. Lasker, et ano., Plaintiffs, -against- Harry G. Burks, Jr., et al., Defendants.	:	73 Civ. 552 (HFW) Reply Affidavit in Support of Renewed Motion to Dismiss

State of New York)
: ss.:
County of New York)

Roger T. Wickers, being duly sworn, deposes and says:

I submit this reply affidavit in support of the renewed motion to dismiss and to reply to certain inaccurate allegations made in the papers filed by plaintiffs in opposition to the renewed motion to dismiss.

1. Plaintiffs attempt to make much of the fact that I was the contact with Chief Judge Fuld, and mistakenly assert that I "retained" Chief Judge Fuld. The fact of the matter is, as plaintiffs know from the testimony of all five directors, it was those directors who retained Chief Judge Fuld --- I merely performed the mechanical function of contacting him, and determining his availability. Thereafter, I gathered documentary materials and files requested by Chief Judge Fuld, arranged appointments with Anchor personnel requested by Chief Judge Fuld and, at the request of the five directors, contacted Chief Judge Fuld to coordinate the time and place of his meeting with the five directors. At no time did I ever discuss with Chief Judge Fuld

the merits of this action, his report, or any other substantive matter. Since the five directors were from different parts of the country, it would have been logistically inconvenient for them to attempt to perform these administrative functions for themselves.

2. Plaintiffs imply that the Directors Qualifications Committee may have been created for the purpose of finding and nominating directors who would be favorable to the defendants in Lasker --- nothing could be further from the truth. The facts are these: the Directors Qualifications Committee was established in 1971 in response to shareholder questions on the procedure for selection of directors, and, more specifically, on why there were no female directors. At the time the Directors Qualifications Committee was established, the Lasker action, which was filed in 1973, was not even pending. The Directors Qualifications Committee, during the period 1971 through the present, has considered numerous possible candidates, and has sought, at all times, to procure the most highly qualified nominees for membership on the Board of Directors. To complete the record before this Court, annexed to this affidavit as Exhibit A are copies of excerpts of minutes from the meetings of the Board of Directors of Fundamental of July 28 and October 20, 1971, April 25 and July 25, 1973, and the excerpts of the minutes of the meetings of the Directors Qualifications Committee of March 22, 1972, April 25, May 23 and June 27, 1973, relating to the creation of the Directors Qualifications Committee and the nominations of these particular directors.

3. Finally, I respectfully call to the attention of this Court the fact that the Sargent affidavit, submitted by plaintiffs as part of their papers in opposition to the renewed motion to dismiss, is mere personal opinion. Fundamental disagrees with the opinion expressed (i.e., that there is no such

the merits of this action, his report, or any other substantive matter. Since the five directors were from different parts of the country, it would have been logistically inconvenient for them to attempt to perform these administrative functions for themselves.

2. Plaintiffs imply that the Directors Qualifications Committee may have been created for the purpose of finding and nominating directors who would be favorable to the defendants in Lasker --- nothing could be further from the truth. The facts are these: the Directors Qualifications Committee was established in 1971 in response to shareholder questions on the procedure for selection of directors, and, more specifically, on why there were no female directors. The Directors Qualifications Committee, during the period 1971 through the present, has considered numerous possible candidates, and has acted, at all times, to procure the most highly qualified nominees for membership on the Board of Directors. To complete the record before this Court, annexed to this affidavit as Exhibit A are copies of excerpts of minutes from the meetings of the Board of Directors of Fundamental of July 28 and October 20, 1971, April 25 and July 25, 1973, and the excerpts of the minutes of the meetings of the Directons Qualifications Committee of March 22, 1972, April 25, May 23 and June 27, 1973, relating to the creation of the Directors Qualifications Committee and the nominations of these particular directors.

3. Finally, I respectfully call to the attention of this Court the fact that the Sargent affidavit, submitted by plaintiffs as part of their papers in opposition to the renewed motion to dismiss, is mere personal opinion. Fundamental disagrees with the opinion expressed (i.e., that there is no such

thing as a disinterested director of a mutual fund) but, more to the point, Fundamental wishes to record its position that the Sargent affidavit is entirely irrelevant to the sole issue left open by this Court, i.e., whether or not these five directors were truly disinterested and independent. Mr. Sargent, to the best of my knowledge, has never met with any of the five directors, nor does his affidavit indicate that he reviewed any of the pleadings, depositions, or other papers in this action. Accordingly, his affidavit should be given no weight on this renewed motion to dismiss.

Roger T. Wickers

Sworn to before me this
9th day of November, 1976.

Martin I. Kaminsky

MARTIN I. KAMINSKY
Notary Public, State of New York
No. 30-[illegible]
Qualified in Nassau County
Certificate filed in New York County
Commission expires March 30, 1977

Appendix A to Reply Memorandum in Support of Renewed Motion to Dismiss
Chart showing relationships of members of Disinterested Quorum
to Co-directors

Disinterested Director - William J. Stephens

Defendants	Known to Stephens when he became a director
Harry G. Burks, Jr.	No
Edward B. Burr	No
Thomas F. Chalker	No
John R. Haire*	No
Harvey C. Hopkins*	Yes
S. P. Hutchison	No
Donald L. Kemmerer*	No
A. S. Mike Monroney	No
Charles F. Phillips	No
Jeptha H. Wade	No
Members of Disinterested Quorum	
Louis F. Laun	No
Mary S. O'Connor	No
Dr. Beryl Robichaud	No
Leon T. Kendall	No

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* Asterisk indicates members of the Directors' Qualifications Committee who proposed names to full Board of Directors for nomination as a director.

Disinterested Director - Louis F. Laun

Defendants	Known to Laun when he became a director
Harry G. Burks, Jr.*	No
Edward B. Burr	No
Thomas F. Chalker	No
John R. Haire*	No
Harvey C. Hopkins	No
S. P. Hutchison	No
Donald L. Kemmerer	No
A. S. Mike Monroney	No
Charles F. Phillips*	Yes
Jeptha H. Wade	No
Members of Disinterested Quorum	
Mary S. O'Connor	No
Dr. Beryl Robichaud	No
William J. Stephens	No
Leon T. Kendall	No

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Disinterested Director - Leon T. Kendall

Defendants	Known to Kendall when he became a director
Harry G. Burks, Jr.	Yes
Edward B. Burr	No
Thomas F. Chalker	No
John R. Haire*	Yes
Harvey C. Hopkins	No
S. P. Hutchison	No
Donald L. Kemmerer*	No
A. S. Mike Monroney	No
Charles F. Phillips	No
Jeptha H. Wade	No
Members of Disinterested Quorum	
Louis F. Laun	No
Mary S. O'Connor	Yes
Dr. Beryl Robichaud*	No
William J. Stephens	No

Disinterested Director - Dr. Beryl Robichaud

Defendants	Known to Robichaud when she became a director
Harry G. Burks, Jr.	No
Edward B. Burr	No
Thomas F. Chalker	No
John R. Haire*	No
Harvey C. Hopkins*	No
S. P. Hutchison	No
Donald L. Kemmerer*	No
A. S. Mike Monroney	No
Charles F. Phillips	No
Jeptha H. Wade	No
Members of Disinterested Quorum	
Louis F. Laun	No
Mary S. O'Connor	Yes
Leon T. Kendall	No
William J. Stephens	No

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

---x

HOWARD M. LASKER and IRVING GOLDBERG,

Plaintiffs,

-against-

HARRY G. BURKS, JR., EDWARD B. BURR,
THOMAS F. CHALKER, JOHN R. HAIRE,
HARVEY C. HOPKINS, S.P. HUTCHINSON,
DONALD L. KEMMERER, A.S. MIKE MONRONEY,
CHARLES F. PHILLIPS, JEPTHA WADE,
ANCHOR CORP., AND FUNDAMENTAL INVESTORS,
INC.,

Defendants.

---x

73 Civ. 552 (HEW)

Deposition of JOHN R. HAIRE, taken by Plaintiffs pursuant to agreement of parties, at the offices of Messrs. Pollack & Kaminsky, 61 Broadway, New York, New York, on February 10, 1976, at 10:00 a.m., before Jack Finz, a Certified Shorthand Reporter and Notary Public within and for the State of New York.

APPEARANCES:

Messrs. ARANOW, BRODSKY, BOHLINGER, BENETAR & EINHORN
Attorneys for Plaintiffs
469 Fifth Avenue
New York, New York

BY: ANTHONY L. TERSIGNI, ESQ.,
-and-
DAVID SWEET, ESQ.,
Of Counsel

Messrs. POLLACK & KAMINSKY
Attorneys for Defendant ANCHOR CORPORATION
and Messrs. HAIRE, BURR, CHALKER & HUTCHINSON
61 Broadway
New York, New York 10006

BY: DANIEL A. POLLACK, ESQ.,
-and-
MARTIN I. KAMINSKY, ESQ.,
Of Counsel

Messrs. SEWARD & KISSEL
Attorneys for Defendant FUNDAMENTAL INVESTORS, INC.,
63 Wall Street
New York, New York 10005

BY: EUGENE P. SOUTHER, ESQ.,
Of Counsel

Messrs. DEWEY, BALLANTINE, BUSHBY, PALMER & WOOD
Attorneys for Defendants PHILLIPS, KEMMERER, WADE, HOPKINS and MONRONEY
140 Broadway
New York, New York

BY: JOHN FRIEDMAN, ESQ.,
Of Counsel

JOHN R. HAIRE, called as a witness by the Plaintiffs, having been duly sworn by the Notary Public (Jack Finz, CSR), was examined and testified as follows:

MR. TERSIGNI: Before we begin, let me state for the record that this deposition is being held by agreement among the parties, in accord with the leave granted by Judge Werker in his decision of September 1975.

EXAMINATION BY MR. TERSIGNI:

Q Mr. Haire, what is your business or profession, sir?

A I am chairman of Anchor Corporation.

Q What business are you engaged in?

A Anchor Corporation is an investment management company, providing investment advisory and corporate supervisory services to the Anchor group of mutual funds, which includes Fundamental Investors, Incorporated.

Q Do you function in what is generally referred to as the mutual fund industry?

A That is correct.

Q Does that phrase have a meaning for you in the mutual fund industry?

A Yes, it does.

Q What do you understand by the mutual fund industry?

A That would be the business of managing and distributing mutual funds to the public.

Q How long have you been engaged in that business, sir?

A Since 1959.

Q And prior to that time?

A Prior to that time I was a vice president of the New York Stock Exchange, ~~from 19 --~~ in the 1950s. 9

Q Are you an attorney, sir?

A I am.

Q Have you ever practiced law?

A For a very brief period, less than a year after my graduation from Harvard Law School in 1950.

Q And thereafter you went into pursuits other than the law, I take it?

A I did.

Q Between that time and the time that you were affiliated with the New York Stock Exchange, what, generally and briefly, was your experience?

A From 1951 to 1953, I served as the

administrative assistant to a gentleman by the name of William H. Vanderbilt.

Q Vanderbilt?

A Vanderbilt.

And then in 1953 I joined the New York Stock Exchange.

Q Other than your law degree, do you hold any other degrees?

A No, I do not.

Q What is your position with Anchor Corporation?

A I am chairman of the board and chief executive officer.

Q What state is Anchor incorporated in?

A Delaware.

Q When was it incorporated?

A I don't recall that date. I'm sure we can find it for you.

Q Was it prior to 1959?

A We have had a series of corporate reorganizations through the years, and I honestly just don't remember the year of its incorporation.

Q Do you have an employment contract with Anchor Corporation?

A No, I do not.

Q Would you describe briefly for us what your duties are with respect to Anchor Corporation as chairman and, I believe you said, chief executive officer?

A That is correct. I am chief executive officer, and my duties generally are the overall responsibility for the operation of the -- the overall responsibility for the operation of the company.

Q Would it be fair to say that you run it on a day-to-day basis, or you are in charge of running it on a day-to-day basis?

MR. POLLACK: I object to the form of the question.

MR. TERSIGNI: I will try to rephrase it, if you will tell me what the objection is.

MR. POLLACK: I object to the form.

MR. TERSIGNI: Is there anything particular that I can rephrase?

MR. POLLACK: I don't know what you mean when you say "run it on a day-to-day basis."

Q Is it part of your duties to be responsible for the day-to-day functioning of Anchor Corporation?

A As chief executive officer, I am responsible to the board for the operation of the company. I obviously cannot assume responsibility for everything that goes on in every phase of its operation on every day of the year.

Q Do all operating officers ultimately report directly or indirectly to you?

A Yes, they do.

Q How many directors sit on Anchor's board?

A On Anchor's board, there are six directors.

Q Would you identify them, please?

A Myself, Thomas Martin, president of Anchor, Edward B. Burr, vice chairman of Anchor, Melvin Intriligator, senior vice president of Anchor, Mr. Stanley Hutchinson, the president of Anchor's parent company, Washington National Corporation, and Mr. George Kendall, Jr., another senior officer of our parent company.

Basically the Anchor board is an inside board, because we are a wholly owned subsidiary of Washington National Corporation.

Q Is Mr. Kendall in any way related, to your knowledge, to the Leon Kendall who is a director of Fundamental?

A He is not related to him in any way.

Q Do you know whether they know each other?

A They have never met.

Q How do you happen to know that, sir?

A I know both of the individuals, and the coincidence of name has been commented on, and they both told me they have never met.

Q I take it you discussed that subject with the two individuals involved?

A Yes.

MR. POLLACK: You may recall, Mr. Tersigni, that your partner raised that question with us, and I undertook to provide that information, and it is for that reason that Mr. Haire was made aware of the question.

MR. TERSIGNI: There is nothing improper about the witness' discussing that with either of those gentlemen.

MR. POLLACK: I quite agree.

Q Mr. Haire, do you own any stock in Anchor Corporation?

A No, I do not. It's a wholly owned subsidiary of Washington National Corporation.

Q Do I understand correctly that Washington National Corporation owns all of the stock of Anchor?

A It owns all of the common stock of Anchor Corporation.

Q Is it a wholly owned subsidiary or isn't it?

A I jsut said it was a wholly owned subsidiary.

Q So Washington owns all of the stock of Anchor; is that correct, sir?

A It owns all of the common stock. There is a small senior issue which is owned by a corporation by the name of First Investors Corporation.

Q Would I understand correctly that Washington National owns all of the stock except that portion of the stock which is owned by First Investors?

A That's correct.

Q What, if any, relationship do you have to First Investors?

A None, other than the fact that they are the owners of the class of stock I've mentioned, and that they are the sponsors of what is called a contractual plan on the shares of Fundamental Investors and Anchor Growth.

Q Other than yourself and Mr. Martin, who are the other officers of Anchor Corporation?

A I've mentioned Mr. Intriligator, who is senior vice president, one of our directors. And the other principal officers of the company would be Mr. Roger Wickers and Mr. James McGonigle, and Mr. Arthur White, the treasurer.

Q Were you at any time a stockholder of Anchor Corporation?

A Yes, I was, prior to the acquisition of Anchor by Washington National Corporation.

Q When did Washington National Corporation acquire Anchor?

A 1969.

Q And since 1969 the stockholdings have been as you described them a moment ago; is that correct?

A That's correct.

Q Who were the stockholders prior to the acquisition by Washington National Corporation?

A There were two classes of common stock of Anchor prior to 1969, a Class A stock, which was owned by Longview Corporation, which, in turn, was controlled by myself and the other senior officers of Anchor, and there was a Class B stock, which was held by the public, and was publicly traded over the counter.

Q Was the Class B stock voting stock?

A Yes, it was, although the Class A stock had greater voting rights than the Class B.

Q Did the Class A voting stock have controlling voting power?

A Yes.

Q That Class A stock was owned by yourself and you say the other officers of Anchor at that time?

A It was owned by Longview Corporation, which, in turn, was owned by the senior management of the company.

Q Of Anchor?

A Of Anchor, that is correct.

Q Which included yourself?

A That is correct.

Q Mr. Burr?

A That is correct.

Q Anybody else?

A Mr. Intriligator, Mr. Wickers, and others who were at that time senior officers.

Q Any others included in that category --

A No.

Q -- who are still associated with Anchor?

A Not that I recall. Mr. White might have had a modest position in the company.

Q Mr. who?

A Mr. White, who I mentioned, the treasurer, might have had a modest stock position in Longview Corporation.

Q Did you and Mr. Burr control Longview?

A Yes, we did.

Q Mr. Haire, how long has Anchor or any of its predecessors been investment advisor to Fundamental Investors, Inc.?

A I think ~~it would be --~~ it goes back into the 1930s. If you trace back to the company by the name of Investors Management Company, which subsequently became a subsidiary of Anchor's predecessor. 9

However, whatever the date is, it's long before my employment by Anchor, which started in 1959.

Q Would it be fair to say that through various corporate permutations, Anchor and Fundamental have been associated in a fund-advisor relationship all the way back to the thirties?

A Yes, certainly the late thirties.

Q You mentioned earlier the Anchor group of funds, I believe.

A I did.

Q Would you explain for the record, what is the Anchor group of funds?

A These are a number of open end investment companies, all of which retain Anchor Corporation as their investment advisor, and underwriter.

Q Would you name them?

A Yes.

As I previously mentioned, Fundamental Investors is one, Anchor Growth Fund, Anchor Income Fund, Anchor Spectrum Fund, Washington National Fund, and Anchor Reserve Fund.

Q Is that six or seven? I lost count. Are there six or seven?

A I think I named six. There are six which we commonly refer to as the Anchor group of funds.

In addition, we also manage a new fund by the name of Anchor Daily Income Fund.

Q Is that latter fund considered part of the Anchor group or not?

A The Anchor Daily Income Fund is a so-called no load fund, which is sold without a sales charge. While it is managed by Anchor, we commonly, in our company, refer to only those funds sold with a sales charge as the Anchor group.

Q Those are the six load funds?

A When we use the name, we would be referring to the six load funds which I mentioned first.

Q Then there is a seventh no load fund?

A That is correct.

Q Are there any other funds that might be included within the Anchor group in the more generic sense?

A No, I think I've named them all.

Q So it would be those seven?

A Right.

Q Has Anchor's association with the other six funds been as long standing as the relationship with Fundamental that you described a few moments ago?

A In the case of each of the other funds, each of them was created and organized originally by Anchor Corporation, but none of those dates of organization would go back as far as our relationship with Fundamental.

Q How would you compare them from the point of view of longevity? Are the other six much more recent, or how would you describe them?

A They would vary from Anchor Growth Fund and Anchor Income Fund, whose predecessor funds were organized by Anchor in the early fifties, to Anchor Reserve Fund and Anchor Spectrum Fund, which were organized within the last three or four years.

Q So that, Fundamental is by far the most senior, timewise, of the funds?

A That is correct.

Q Would you compare the funds generally from the point of view of size?

A Fundamental is the largest, and at approximately 600,000,000 in assets is more than twice as large as the second largest, which is Anchor Growth Fund.

Q What are the total assets of all the funds combined, approximately?

A Approximately one billion one hundred million dollars.

Q So that, Anchor by itself accounts for more than half of the total assets of all the funds on the combined basis; is that right?

MR. POLLACK: Fundamental, not Anchor.

MR. TERSIGNI: I'm sorry.

Q Fundamental does?

A That is correct.

Q From the point of view of fees realized by Anchor for services rendered to various funds in the Anchor group, how would you compare the Fundamental fund with the other funds in the group?

A The management fee revenue realized from Fundamental Investors would represent approximately half of our management fee revenue.

Q So it would be in line with the asset picture; is that correct?

A Generally, yes. Although because there is a scale-down fee, the fee rate per hundred million would be slightly less.

Q But roughly it would be in accord with the asset size of the various funds, your fees being generally computable on the basis of net asset value; is that right?

A Generally that is correct.

Q Would it be fair to say, from a business make the direction, and we will get a ruling.

MR. POLLACK: I have done so.

BY MR. TERSIGNI:

Q Mr. Haire, who are the directors of Fundamental Investors, Inc.?

MR. POLLACK: Mr. Tersigni, isn't this a matter of record in your complaint?

MR. TERSIGNI: No, sir.

Q Would you answer the question, please?

A The directors of the fund at the present time --

MR. POLLACK: I would say, Mr. Haire, and I am advising you that the directors at the present time is not necessarily the relevant question. The question is who were the directors between July 24, 1975, and January 22nd -- July 24, 1974, and January 22, 1975. If they happen to be the same directors as are presently in office, you may make that point.

Q Would you tell us now who the directors are?

A If I may, I'll have to write them down so I can be sure that I cover them all.

Q Take your time.

A The directors of Fundamental Investors include myself, Mr. Thomas Martin, Mr. Edward Burr, Mr. Stanley Hutchinson, being the four directors who are affiliated with Anchor Corporation, and the following disinterested directors:

Dr. Phillips, Mrs.O'Connor, Dr. Kendall, Mr. Stephens, Mr. Laun, and Miss Robichaud.

Q You referred to the latter five as disinterested directors; is that right?

A I did.

MR. SOUTHER: I object to that. He referred to seven as disinterested.

MR. TERSIGNI: I'm sorry, he referred to six, so I guess we will have to settle on that objection.

MR. SOUTHER: All right, six.

Q What do you mean when you referred to them as disinterested?

A The term "disinterested directors" comes from the Investment Company Act of 1940, and is a defined term.

Q And you use it in the Investment Company Act sense?

A I do.

Q You don't mean it in any lay sense?

A Certainly not.

Q So that, for example, you don't mean that they are disinterested in the company's affairs?

A Obviously not.

MR. POLLACK: Do you perhaps mean uninterested, Mr. Tersigni?

MR. TERSIGNI: Can we continue?

Q Are these same people on the boards of any of the other Anchor funds?

A They are -- the boards of the other funds in the Anchor group are identical to the board of Fundamental.

Q In other words, this present board that you have listed for us also constitutes the board of the other five funds, in the no load category?

A In the load category?

Q In the load category, I'm sorry.

A That is correct.

Q What about the one fund in the no load category?

A Basically it has the same board. Dr. Kendall is not a member of that board. Leon Kendall.

Q How long has it been true that the directors of any one fund in the Anchor group sat on the boards of all the other funds in the Anchor group?

A I'm sorry, I was listening --

MR. TERSIGNI: Would you read that back, please.

(The pending question was read by the reporter.)

A The boards of the various funds have been identical as long as I have been with the company.

Q So that would be from 1959?

A That is correct.

Q Are the directors compensated for their services as directors?

A They are.

Q Would you describe generally how that compensation is determined?

A The disinterested directors receive an annual salary from two of the funds. A salary of $3,000 a year from Fundamental Investors, a salary of $1800 a year from Anchor Growth Fund, the second largest fund.

In addition, all of the directors receive g

meeting fees for attendance at meetings of the board ~~or of —~~ or in the case of disinterested directors, they also receive the same meeting fee for attendance at a committee meeting.

Q What is the fee for attendance at a board meeting?

A The fee for attendance at a meeting of Fundamental Investors is $200 per meeting.

Q What is the fee for attending a board meeting of the other six funds?

A The fees for the other funds vary fund by fund. They would total $375, including the $200 from Fundamental.

Q And that includes all of the funds, including the no load fund?

A That is correct.

Q So in total, for attendance at a meeting for all of the funds, a director would receive how much, 400 --

A And $75.

Q $475.

And this is above and beyond the $4800 which you described, I believe, as a salary?

A That is correct.

Q How many meetings are there of the various funds annually?

A There are eleven board meetings in a year. We do not meet in the month of August.

Q So would each director attending all the meetings receive eleven times $475?

A That would be correct.

Q That's approximately $5,000, according to my math.

A Approximately.

Q Without holding me to the exact figure.

So we are up to $9800, approximately.

A Correct.

Q You said that the directors are also compensated for attending committee meetings.

A Correct, the disinterested directors are.

Q In other words, the five or six that you mentioned earlier?

A That is correct.

Q What you are saying is that the Anchor people who sit on Fundamental's board are not compensated in that regard because Anchor is paid to furnish executive and administative?

MR. POLLACK: I object to the form of the question.

MR. TERSIGNI: He can answer, subject to the objection.

A The directors of the fund who are affiliated with Anchor Corporation are paid a fee for attending board meetings but not for attending committee meetings.

Q Is that because Anchor has a contract which governs administrative services, or is there some other reason they are not paid?

A I can't speak as to the reason. That's been the practice as long as I've been with the company.

Q Anchor does have a contract, does it not, under which it agrees to furnish executive and administrative services?

A It does.

Q And there is a whole formula for compensating Anchor for those services?

A That is correct.

Q With respect to these committees, how many committees, generally, would you say there are in connection with these funds in the Anchor group?

A There is a contract committee, a brokerage committee, an audit committee, and a committee on directors' qualification and corporate responsibility.

That would be four standing committees.

Q Any other committees that might be in a category other than standing committees?

A Those are the only four that I can think of at the present time.

Q You can't think of any other ad hoc committees?

A No.

MR. POLLACK: Are you speaking with reference to this lawsuit, Mr. Tersigni?

MR. TERSIGNI: No, just in general terms.

In other words, do they organize committees from time to time to look into some particular investment policy, or so on and so forth.

A No, I would say that any question that the board has would be referred to one of these ~~board~~ FOUR ~~meetings~~ COMMITTEES.

Q Is there an executive committee?

A No, there is not.

Q Do the directors that you characterized

as disinterested serve on each of the four committees
you have mentioned?

A Not all of them serve on the four committees. They are assigned among committees.

Q Some are on one committee, some are on others, and so forth?

A Right.

Q What is the size of these committees?

A Generally three, in some cases four directors.

Q Are affiliated directors on these committees?

A As a minority in each case.

Q As a minority?

A Yes.

Q How many committee meetings would you estimate there would be in a representative year for all of the Anchor funds?

A It will vary from year to year, but if one had to generalize I would say four. Any individual might attend four or five committee meetings in a year. It's possible that some committees might be less active and it might be less.

Q So as I understand it, any one of these disinterested directors, assuming he has perfect attendance, would generally attend eleven board meetings, and typically four or five committee meetings relating to these other committees that he might be serving on; is that a fair statement?

A That would be generally true, yes.

Q What is the compensation that a director in this category might receive for attending these committee meetings?

A As I indicated, the fee is the same as for attendance at a board meeting.

Q And you said that was $200?

A In the case of Fundamental, $200.

Q So there might be 800 or a thousand additional dollars of compensation in a typical year for one of these so-called disinterested directors?

A If the committee meeting involved only Fundamental, yes. If a committee were focusing on a question which involved all of the funds, the compensation for that meeting would be the $475, rather than just the $200 applicable to Fundamental.

Q That would bring it up to the same $475 that we discussed in connection with the board meeting?

MR. POLLACK: I direct the witness not to answer it.

MR. TERSIGNI: Can we have this marked for identification.

(Agreement for investment supervisory and corporate administrative services between Fundamental Investors, Inc., and Anchor Corporation, dated November 30, 1973, marked as Plaintiffs' Exhibit 1 for identification, as of this date.)

Q Mr. Haire, I show you Plaintiffs' Exhibit 1 for identification, and I ask you whether you can identify that document.

A This is a copy of the agreement for investment supervisory and corporate administrative services between Fundamental Investors and Anchor Corporation, dated November 30, 1973.

Q Does that document set forth the services that Anchor was to furnish to the fund?

A Yes, it does.

MR. TERSIGNI: I would like to state for the record that this document was furnished to us by Mr. Pollack in connection with this discovery, and I would like to question him about it.

MR. POLLACK: Your statement is erroneous and incorrect. Mr. Souther furnished that document to you, at your request.

MR. TERSIGNI: Okay, I stand corrected. Mr. Souther furnished it to us in connection with this discovery. And I assume that that document is relevant, and, therefore, I would like to question the witness about it.

MR. POLLACK: The assumption that you make is not one that we share. We produced the document because it's a matter of public record and you wanted to see it. We don't believe it is relevant. But let us wait for your specific questions.

Q What kind of underwriting service does Anchor perform for Fundamental?

MR. POLLACK: Objection. I direct the witness not to answer.

Q Does Anchor perform underwriting services for other funds in the Anchor group?

MR. POLLACK: Objection. I direct the witness not to answer.

Q Does the fund have any executive personnel who are not furnished to it by Anchor?

A It does not.

Q Does the fund have any administrative personnel who are not furnished by Anchor?

A It does not.

Q Does the fund occupy space, physically, furnished to it by Anchor?

A It does.

Q On the basis of your knowledge of the operation of this fund, Mr. Haire, and the other funds in the Anchor group, and on the basis of your 17 or so years in the mutual fund industry, would it be possible for the fund to operate without the administrative, executive, and other services furnished to it by the investment advisor?

MR. POLLACK: Mr. Tersigni, how does this go to the independence of the five directors who function on the decision at issue in this particular discovery proceeding?

MR. TERSIGNI: Mr. Pollack, if the very day-to-day existence of this fund depends on the good grace of Anchor, it is my position that not only these five directors, but the entire board of directors, is subject to the influence of Anchor, and is not independent. If one entity can economically sign the death

MR. POLLACK: I hear your statement. I do not agree. But perhaps you might put your next question.

MR. TERSIGNI: Why don't you let him answer subject to your arguing to Judge Werker that it's irrelevant?

MR. POLLACK: Why don't you put your next question?

MR. TERSIGNI: Is that the sole basis for your directing him not to answer, that it's irrelevant?

MR. POLLACK: Please put your next question, Mr. Tersigni. I have directed the witness not to answer. You have a remedy, should you choose to use it.

MR. TERSIGNI: I think you are only prolonging this examination.

BY MR. TERSIGNI:

Q Mr. Haire, did you have any understanding in 1975, in or about January of 1975, whether this advisory contract, which has been marked Plaintiffs' Exhibit 1 for identification, was terminable on the option of Anchor?

MR. TERSIGNI: By the way, I will indicate for the record that the pencil marks, including the pencil mark on page 3, in the margin of this exhibit, is mine.

A The agreement can only be terminated by Anchor on 60 days' notice prior to the expiration of the contract or any subsequent anniversary.

Q So this contract was due to expire on May 1, 1975; is that correct?

A That is correct.

Q And you understood, did you not, in January, that you could, up until 60 days prior to May 1, 1975, terminate this contract?

A We had the legal right to terminate it.

Q And that all youhad to do was advise the fund in writing?

A That would be correct.

Q And if you did that, all of the administrative, advisory, and other services that are provided under this contract, would come to an end; is that right?

A And so would our gross revenue from this fund, which you have already indicated was the major source of our revenue.

Q Would you answer the question? Is the

answer yes?

A Yes.

MR. POLLACK: I think the witness answered the question.

MR. TERSIGNI: The question called for a yes or no, not an argument.

MR. POLLACK: I believe that the witness answered the question.

MR. TERSIGNI: He now has.

Q I ask you again, without those services, could the fund have operated?

A Yes, it could.

Q Explain how.

A It could operate by seeking within that period of time another advisor.

Q Any other way?

A Yes, by seeking to hire the individuals who already served the fund, and putting them directly on the fund's payroll.

Q Are those all Anchor people that you are talking about?

A That are currently employed by Anchor.

Q What you are saying is that if Anchor terminated this contract, that the so-called outside directors could have hired Anchor's administrative people and put them directly on the fund's payroll?

A They certainly could.

Q And youwould have permitted that?

A I wouldhave no choice over it. They are not under contract to Anchor.

Q Does that include Mr. Martin?

A That is correct.

Q Mr. Hutchinson?

A Mr. Hutchinson is not an employee of Anchor.

Q Does it include you?

A It does.

Q Anybody else that it includes?

A It includes all of the employees of Anchor.

Q Mr. Wickers?

A Yes.

Q Mr. Haire, are you a stockholder in Fundamental?

A Only indirectly, through a pension plan.

Q Directly or indirectly, are you a stockholder?

A I am.

Q How many shares do you own directly or indirectly?

A I do not have the precise figure in my mind.

Q Can you approximate them?

A I'd have to supply the figure for you.

Q Would it be somewhere in the neighborhood of 15,000 shares?

A It might be, but I could not be certain.

Q What is the current price of a share of Fundamental?

A Approximately six or seven dollars a share.

Q Is Anchor a stockholder of Fundamental?

A Not that I recall.

Q Not that you recall?

A Yes. The reason for that response is that in some of the newer ~~numbers~~ FUNDS, Anchor provided the so-called seed money, and has a $100,000 investment in some of those smaller funds. I would presume that that is not true in the case of the older funds, including Fundamental Investors. g

Q Does Anchor purchase shares of the fund as principal for resale to persons other than dealers?

A ~~Under our —~~ For resale to persons other than dealers? g

Q Yes. I am reading from your proxy statement, from the fund's proxy statement of June 26, 1974.

A The only circumstances under which I could think that that would occur would be where Anchor was the dealer of record on an account, and where the shareholder who held that account made a purchase, and Anchor would, under those circumstances, temporarily purchase the shares and then transfer them to the --

Q Do you see the statement in the fund's proxy statement of June 26, 1974, that I marked with a check mark?

A Yes.

Q Is that a true statement?

A Yes, it's true.

Q Did or does Anchor maintain any kind of an inventory of Fundamental shares for purposes indicated in the proxy statement?

A No.

Q Does it make purchases such as are referred to in that proxy statement?

A I just stated that the only circumstances under which that would occur would be where Anchor was a dealer of record for any individual investor.

Q That would be pursuant to its underwriting function?

A It's within the terms of the underwriting agreement, yes.

Q I ask you again, what are the underwriting services that Anchor furnishes to the fund?

MR. POLLACK: Mr. Tersigni, we have been through this. I have instructed the witness not to answer. I fail to see any connection between the question and the scope of discovery as stated by Judge Werker.

MR. TERSIGNI: I am trying to find out who the stockholders are, Mr. Pollack, and who controls this fund.

MR. POLLACK: Why don't you ask that question?

MR. TERSIGNI: I would like to ask the question I asked. You have directed him not to answer on the grounds that it's irrelevant to the question of control, as I understand it. We will have to get a ruling.

Can we mark this proxy statement as Plaintiffs' Exhibit 2, please.

(Notice of annual meeting and proxy statement,meeting held June 26 1974, marked as Plaintiffs' Exhibit 2 for identification, as of this date.)

Q Plaintiffs' Exhibit 2 for identification is a proxy statement dated June 26, 1974 -- correction, relating to the annual meeting of June 26, 1974, of Fundamental Investors, Inc.

MR. TERSIGNI: I call for production of Fundamental's proxy statements for the years 1971 through and including 1975, other than the one that I have marked for identification.

MR. POLLACK: You say you do or you did?

MR. TERSIGNI: I do now call for production.

MR. POLLACK: Quite a time to call for production, I must say.

MR. TERSIGNI: I'm sure in a few days you can get them.

MR. POLLACK: I appreciate your kindness.

Q Mr. Haire, there is a balance sheet for Anchor Corporation subsidiaries annexed to this document, which shows investments in mutual funds of $592,408.

Would you tell me what investments those are?

A As I have already testified in response to an earlier question, the seed money for the newer funds was provided by Anchor Corporation in the amount of $100,000 per fund. That is what was represented on that balance sheet which you have just shown me.

Q Do those investments represent shares, in whole or in part, shares of Fundamental owned by Anchor?

A I previously testified that I do not believe they include shares of Fundamental Investors.

Q Could you verify that information?

A I'd be happy to.

MR. POLLACK: We will.

MR. TERSIGNI: Why don't we leave a blank, and I ask the witness to insert here --

MR. POLLACK: I object to the procedure of leaving a blank. We will advise you by letter.

MR. TERSIGNI: Fine, advise me by letter. What I want to know is any shares of Fundamental owned or controlled, directly or indirectly, by Anchor or any of its affiliates, parents, subsidiaries, or otherwise related corporations or persons.

MR. POLLACK: We will take the request under advisement.

Q Mr. Haire, who is Bean & Company, B-e-a-n & Company?

A Bean & Company I believe is the nominee of the First Pennsylvania Bank & Trust Company, which is the custodian for contractual plans which utilize shares of Fundamental Investors and Anchor Growth Fund as their underlying investment.

Q What was the name of the bank again?

A First Pennsylvania.

Q First Pennsylvania?

A Right.

Q Who selected First Pennsylvanian?

MR. POLLACK: I object and I direct the witness not to answer. I have a hard time seeing how any of this has anything whatsoever to do with the proceeding that we are engaged in at present, or indeed even this lawsuit.

MR. TERSIGNI: Mr. Pollack, it's very simple. I am trying to find out who controls this fund.

MR. POLLACK: Please put your next question.

Q Did you have or Anchor have anything to do with the selection of that bank as custodian?

MR. POLLACK: Same direction.

Q What, if any, dealings have you had over the years with Bean & Company?

MR. POLLACK: Same direction.

Q Does Bean & Company own of record approximately 23 per cent of the fund's shares as of 1974?

MR. POLLACK: Same direction.

Q How many shares of the fund did Bean & Company own of record as of the time that the so-called disinterested quorum decided that this lawsuit should not proceed?

MR. POLLACK: Same direction.

MR. TERSIGNI: What's the basis for the direction?

MR. POLLACK: Mr. Tersigni, I don't think this is an appropriate time for me to explain to you the opinion that Judge Werker has written so clearly.

MR. TERSIGNI: All you have to say, is it irrelevant, or is it you don't like my question, or what is it? Do you consider it irrelevant?

MR. POLLACK: Please put your next question.

Q Is Washington National Corporation a stockholder in the fund?

A In Fundamental Investors?

Q Yes.

A Not to my knowledge.

Q Who would know that?

A I presume an officer of Washington National Corporation.

Q Do you sit on Washington National Corporation's board of directors?

A I do.

Q And you have no idea whether that company owns any shares in one of the funds in your group?

A I have no reason to think they do.

Q Do you know, sir?

MR. POLLACK: Mr. Tersigni, how many times are you going to ask the same question?

Q Do you know, sir?

A I have said, to the best of my knowledge, they do not.

Q I would like you to verify that.

MR. POLLACK: We will take your request under advisement.

Q And to advise me.

Does Mr. Burr own any stock in Fundamental?

A He does.

Q Does he own about the same thing you own?

A I have no idea.

Q Does Mr. Hutchinson own stock in Fundamental?

A Yes, he does.

Q Does Mr. Martin own any stock in Fundamental?

A I do not know.

Q Could you verify that for me, please?

MR. POLLACK: We will take your request under advisement.

Q What is the relationship between Anchor National Life Insurance Company and Anchor Corporation?

MR. POLLACK: Objection. I direct the witness not to answer.

Q Does Anchor National Life Insurance Company own any stock in Fundamental?

A No.

Q Are you sure?

MR. POLLACK: Mr. Tersigni, please. Put your next question.

MR. TERSIGNI: I would like an answer to that one.

MR. POLLACK: I direct the witness not to answer. I think it's insulting.

Q What is the relationship between Anchor and Anchor National Life Insurance Company of New York?

MR. POLLACK: Same direction.

Q Does Anchor National Life Insurance Company of New York own any stock in Fundamental?

A Not to my knowledge.

Q Who would know that?

A The officers of the company.

Q Are you an officer of the company?

A I am not.

Q Is that company affiliated with Anchor?

A It is under common ownership.

Q Common ownership. All right. I would like an answer to thatquestion, whether or not Anchor National Life Insurance Company of New York owns any stock in Fundamental.

MR. POLLACK: The witness answered the question, I believe.

MR. TERSIGNI: No, he hasn't. He said not to his knowledge.

Q What relationship is there between Anchor Corporation and Anchor National Financial Services, Inc.?

MR. POLLACK: Same direction.

Q Does Anchor National Financial Services, Inc., own any shares of Fundamental?

A I do not know.

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Q Who would know that, sir?

A Officers of the company.

Q Are you an officer of the company?

A I am not.

Q What is the relationship between Anchor National Financial Services, Inc., and Anchor Corporation?

MR. POLLACK: Same direction.

Q Do you sit on the Anchor National Financial Services board?

A I do.

Q Name an officer of that company that might know the answer to my question.

A Mr. Burr, the chairman, I guess, or its treasurer.

Q Or who?

A Or its treasurer.

Q Who is its treasurer?

A Mr. Pfeifer.

Q Mr. Burr is the same Mr. Burr who is a defendant in this case?

A That is correct.

Q And who is associated with you in connection with Anchor Corporation?

A That is correct.

Q And who controlled -- was it Parkview -- with you prior to the merger of Anchor into Washington National?

MR. POLLACK: Objection to the question. The witness never testified that Mr. Burr controlled Longview. And I don't think it's relevant. You have had an identification of Mr. Burr. What is it you are trying to do, create a colored record?

MR. TERSIGNI: Colored?

MR. POLLACK: Please put your next question.

Q You referred earlier to First Investors Corporation. Do you recall that, Mr. Haire?

A Yes.

Q And I believe you testified that that corporation owns part of the stock of Anchor Corporation. Is that correct, sir?

A I said it owned a class of stock of Anchor, that is correct.

Q Is First Investors Corporation a stockholder in the fund?

A I do not know.

Q Who would know that, sir?

A Officers of First Investors Corporation.

Q Who is that?

A Well, the two senior officers would be Mr. David Grayson and a Mr. Glen Head.

Q I would like to read to you from the Fundamental Investors prospectus, dated May 1, 1974, page 13: "Under an agreement with Anchor, First Investors Corporation purchased fund shares at net asset value for plans for the purchase and accumulation of fund shares for which First Investors Corporation acts as sponsor."

Are you aware of the agreement between Anchor and First Investors Corporation relating to the latter's purchase of fund's shares?

MR. POLLACK: I object. I direct the witness not to answer.

Q How many shares of stock of Fundamental does First Investors Corporation own?

A I have already testified that I do not know that they own any.

MR. TERSIGNI: I call for such information.

Would you mark this for identification, please.

(Prospectus dated May 1, 1974,
of Fundamental Investors, Inc.,
marked as Plaintiffs' Exhibit 3

for identification, as of this date.)

MR. TERSIGNI: Plaintiffs' Exhibit 3 for identification is the prospectus of Fundamental Investors, Inc., dated May 1, 1974, and I call for the production of similar prospectuses for the years 1971 through '75, with the exception of this one.

MR. POLLACK: I decline to produce such documents.

MR. TERSIGNI: You decline?

MR. POLLACK: Yes, we do.

MR. TERSIGNI: On what ground?

MR. POLLACK: On the grounds that they are not relevant to this proceeding. And, furthermore, they are public documents which you can easily obtain yourself.

Q I would like to read to you, Mr. Haire, from page 4 of Exhibit 3 for identification: "Anchor, acting as agent of the fund, sells shares to investment dealers, including its wholly owned subsidiary, Anchor National Financial Services, Inc., at the public offering price less a discount."

Is that a true statement?

A It is.

MR. TERSIGNI: Is there an objection?

MR. POLLACK: Please proceed.

Q Does Anchor National Financial Services, Inc., maintain an inventory in fund stock?

MR. POLLACK: Mr. Tersigni, what has this to do with the disinterested quorum or their decision?

MR. TERSIGNI: I am trying to establish --

MR. POLLACK: I direct the witness not to answer.

MR. TERSIGNI: You have asked me a question.

MR. POLLACK: I understand, but I did not finish my statement. I would appreicate your allowing me to do that.

MR. TERSIGNI: Go ahead.

MR. POLLACK: I have now stated, I direct the witness not to answer.

MR. TERSIGNI: Even before I respond to your question?

MR. POLLACK: Please put your next question, Mr. Tersigni.

MR. TERSIGNI: You asked a question. The answer to your question is I am trying to explore document requests, put them to us in a letter, will you, or to Mr. Souther, who is the appropriate party?

MR. TERSIGNI: I will put them on the record, and you can respond to them.

BY MR. TERSIGNI:

Q Mr. Haire, is Westpark, Inc., an affiliate of Anchor Corporation?

A Yes, it is.

Q Does Westpark deal in Fundamental stock?

A No, it does not.

Q Does it own any Fundamental stock?

A No, it does not.

Q Did it ever own Fundamental stock?

A No, it did not.

Q Do you know whether any of Westpark's customers own Fundamental stock?

MR. POLLACK: I object. I direct the witness not to answer.

Q Mr. Haire, is Washington National Insurance Company different from Washington National Corporation?

A It is.

Q Does Washington National Insurance Company own any stock in Fundamental?

A Not to my knowledge.

Q Who would know that?

A Officers of the company.

Q Can you name one that might know that, that you think would know that?

A Either Mr. Hutchinson, who is an officer of the Washington National Insurance Company, or their treasurer. 9

Q Who is their treasurer?

A I believe their chief financial officer at the present time would be Mr. George Kendall, Jr.

Q And that Mr. Hutchinson is the same Mr. Hutchinson who is a defendant in this case? 9

A That's correct.

Q Would that information be available to you?

A I can ask for it, the same as --

Q Are you a director of the company?

A I am.

Q Do you think you could get that information for me?

MR. POLLACK: I will take your request under advisement, Mr. Tersigni. I think requests for information, as well as for documents, should be addressed to counsel.

MR. TERSIGNI: All right, I soaddress it.

Q Does Washington National Trust Company own any stock in Fundamental?

A It might for customers.

Q It might for customers? Would you explain what you mean by that?

A As its name implies, it's a trust company. It has trust customers. It's possible that an account in the trust company might own shares of one or more of the Anchor funds.

Q Is Washington National Trust Company a subsidiary or affiliate of Washington National Corporation?

A Yes, it is.

Q What is the relationship?

A It's a subsidiary.

Q And if it does hold such stock, would that be on the recommendation of Anchor Corporation?

A No, it would be -- no. The answer is no.

Q Would Anchor Corporation have discussed that with anyone?

A No.

Q How would Washington National Trust Company have come to own stock in an Anchor fund?

MR. POLLACK: If they did, perhaps you might ask an officer of Washington National, if you can convince the judge that it's a relevant question. I object to the form of the question. I also instruct the witness not to answer.

Q Who would have that information, Mr. Haire?

MR. POLLACK: Same direction.

Q Are you an officer of Washington National Trust Company?

A No.

Q Are you a director?

A There are -- Washington National Trust Company of Arizona, which I am a director; there is a Washington National Trust Company of Illinois, of which I am not a director.

Q How many subsidiaries are there of Washington National Corporation?

MR. POLLACK: I object and I instruct the witness not to answer.

MR. TERSIGNI: I call for the following information:

I want to know how many shares of Fundamental Investors are owned or controlled, directly or indirectly, by Washington National Corporation, or by any subsidiary or affiliated corporation of Washington National Corporation, including the specific companies that I have questioned the witness about, and any other companies that fall into that category. I am asking for that information in connection with the question of who controls Fundamental Investors.

Q Mr. Haire, page 9 of Plaintiffs' Exhibit 2 for identification refers to investment dealers affiliated with Anchor, at the check mark.

Do you see that, sir?

A Yes, I do.

Q What is the nature of that affiliation?

A ~~These affiliations --~~ Those broker-dealers that are referred to there would include Anchor National Financial Services, and a company by the name of Washington National Equity Company, which is a dealer.

Q Is that another subsidiary of Washington National?

A It is.

Q Do these dealers deal in Fundamental stock?

A For customers, yes.

Q And they submit proxy cards on behalf of their customers?

A No, they do not.

Q Who submits the proxy cards?

A The customers, the shareholders.

Q Are there any instances where the stock is in the name of the brokerage house on behalf of customers?

A Not these brokers.

Q Not these brokers?

A No, sir.

Q Other brokers?

A Independent broker-dealers, of course.

Q Independent broker-dealers?

A Right.

Q Do you know whether any of these affiliated houses have inventory of Fundamental stock?

A To the best of my knowledge, they do not.

Q Who would know?

A As I said before, the officers of those companies.

Q Name some.

A I have already done so.

Q Would you tell me who might know on behalf of the two companies that you just mentioned?

A Mr. Burr for Anchor National Financial Services, Mr. Hutchinson for Washington National Equity Corporation.

Q And they are both defendants in this case?

A They are.

Q Mr. Haire, to your knowledge, do any of the following own or control any stock in Fundamental: Van Strum and Town, Inc.?

A Not to my knowledge.

Q Who would know?

(Continued on page 69.)

A I don't even know if Van Strum and Town are still in existence.

Q Mr. Martin was and is the president of that company, isn't he?

A He was. He certainly isn't. He is the president of Anchor, as I already testified.

Q Who would know the answer?

A Which question, whether they still exist --

Q No, whether they did or do own any stock in Fundamental, Van Strum and Town, Inc.

MR. POLLACK: Mr. Tersigni, perhaps we can cut this line of inquiry short. I think I see the drift of it. You are asking the witness repeatedly, with reference to all sorts of different entities, whether they own stock in Fundamental.

And I will advise the witness at this point that I think the inquiry is unrelated to anything that is at issue before the Court, and I will suggest that you move to another area.

MR. TERSIGNI: Let me ask my questions, and you can give the direction either separately or -- you can give him a standing objection, you can tellhim not to answer another question, or

Q How about Falcon Capital Corporation?

MR. POLLACK: Same direction.

Q Falcon Fund, Inc.?

MR. POLLACK: Same direction. And it is a standing direction. Perhaps I will spare that much typing on the record.

Q Mr. Haire, can you tell us any other corporations or entities, other than the ones I have questioned you about and as to which counsel has given you certain directions, affiliated in any way with Anchor, which or who may own any stock in Fundamental? Can you identify anyone or any company in that category?

A No.

Q Who would be able to do that?

A The question cannot be answered. I've said I don't know of any companies, so how can I tell you who could answer? I don't know.

Q Do you know who is the largest stockholder of Fundamental?

A No, I do not.

Q Does Fundamental have a stockholders' list?

A Of course.

Q Did it have one as of 1975?

A Of course.

MR. TERSIGNI: I call for production and inspection of Fundamental's stockholder list as of January 1975.

Will you take that under advisement?

MR. POLLACK: We will take all your requests under advisement.

Q Mr. Haire, you know what a proxy contest is, don't you?

A Yes, I do.

Q Has there ever been a proxy contest in connection with any member of the Anchor group of funds?

MR. POLLACK: I object to the question and direct the witness not to answer.

MR. TERSIGNI: What is the objection?

MR. POLLACK: What is the relevance of that question to the decision of the disinterested quorum?

MR. TERSIGNI: We are trying to establish whether the fund is controlled, and it is my contention that not only is this fund controlled, but that every fund in this industry is controlled. That's an economic fact of life. And whether you consider it relevant or not is something else. But I think the witness ought to answer.

MR. FRIEDMAN: I think what we are trying to determine here is the relationship of the disinterested quorum.

MR. TERSIGNI: The disinterested quorum consisted of five directors, who sat on Fundamental's board, and which the defendants claim were independent. My contention is that not only were these five individuals not independent, but the entire board was not independent, and that this is very typical of the mutual fund industry in general.

In order to make that contention, I think I am entitled to inquire of this witness as to those facts. And you can make any argument you want, obviously, but the facts are relevant.

MR. POLLACK: Is there a question pending?

MR. TERSIGNI: Yes.

Do you want to reread the question?

(The pending question was read.)

MR. POLLACK: Same direction.

Q Mr. Haire, in January of 1975, when the so-called disinterested quorum made the decision which is in issue in this case, do you know whether they gave any consideration to a possible proxy fight?

A I haven't the vaguest idea.

Q You don't know?

A I do not know.

Q You never had any discussions with anyone on that subject?

A I never discussed this subject with those people at all.

Q Did you give any consideration in your mind, in or about that time, to whether or not Anchor would conduct a proxy contest in the event that this litigation were pursued against it and its advisory contract were terminated?

MR. POLLACK: I object to the form of the question as speculative, hypothetical.

MR. TERSIGNI: It's not speculative. I am asking the witness whether he gave consideration, in fact, to that subject.

MR. POLLACK: You may answer the question.

A Absolutely not.

Q You never discussed that with anyone?

A I did not.

MR. TERSIGNI: Can we have this marked for identification.

(Memorandum dated January 6, 1975, marked as Plaintiffs' Exhibit 4 for identification, as of this date.)

MR. TERSIGNI: Exhibit 4 for identification is a memorandum from Eugene P. Souther, addressed to Messrs. Kendall, Laun, and Stephens, and Mrs. O'Connor and Miss Robichaud.

Q I would like to read to you from the memorandum that I have identified, paragraph 6, page 4. This is Mr. Souther speaking to the so-called disinterested minority:

"It is possible that some shareholders of the fund in disagreement with the board's decision to terminate the historic relationship with Anchor Corporation may contest the selection by the board and may even nominate their own slate of directors for election at the meeting."

Did you give any thought, Mr. Haire, to whether Anchor or anyone affiliated or connected with Anchor would nominate its own slate of directors in the event that Anchor's relationship with Fundamental was severed?

MR. POLLACK: Did Mr. Haire give that consideration?

MR. TERSIGNI: Yes, Mr. Haire. It occurred to Mr. Souther, and I am asking whether it may have occurred to Mr. Haire.

A No, it did not.

Q Never entered your mind?

A I was not privy to what the disinterested quorum was considering, and the subject was not considered by me.

Q Fundamental was your largest source of fees. You have already testified that it accounts for more than half of Anchor's income. Correct? Is that right?

A Correct.

Q In January of 1975 you knew that these five people were considering whether you and your company should be sued, and whether your contract should be terminated? You knew that, didn't you?

A We were already being sued.

Q Did you know that, sir?

A Did I know what?

MR. POLLACK: Mr. Tersigni, I --

MR. POLLACK: -- that your assumption is incorrect. In any event, this witness has testified that he himself did not receive that memorandum, I believe, or if he didn't testify to it I suppose you might ask him whether he did.

And to question him on a memorandum that was prepared by a lawyer for persons other than Mr. Haire seems to me to be highly improper in this deposition.

MR. TERSIGNI: I am not questioning him about the memorandum. My question was, and I will repeat it:

Q Were you aware, Mr. Haire, that in January of 1975 the five directors that we have identified were giving consideration, at the request of the board, to whether or not in their view this litigation against you and your company should proceed?

Were you aware --

A I was aware of that.

Q You knew about that, didn't you?

A That is correct.

Q Did you know that they were also giving consideration to whether or not, if they decided that the litigation should proceed, you and your company should be terminated as investment advisor?

A No, I did not.

Q You did not know that?

A I did not.

Q Did you have an opinion at that time whether you could continue as investment advisor if these five directors determined that the litigation against you and Anchor should proceed?

A We were defendants in a lawsuit brought on behalf of Fundamental Investors, and had been for two years.

Q The action had been stayed, had it not?

A The action had been stayed, but we were still the defendants in that action.

Q It had been stayed, had it not?

A Yes.

Q And after the stay was lifted, the board requested these five directors to decide, as so-called disinterested persons, whether or not this litigation should proceed against you and your company and the other defendants; you were aware of that, weren't you?

A I testified to that.

Q Did you have an opinion whether your

decision to continue the litigation or to allow the litigation to continue, that you could have, that is, Anchor could have continued to serve this fund?

A Yes.

Q You don't feel --

MR. POLLACK: I object to the form of the question.

MR. TERSIGNI: All right. He has answered.

Q You don't believe that you would have been disabled from doing so?

A Not from our point of view, no.

Q Your personnel wouldn't have been so totally distracted that you couldn't have rendered your services; is that right?

A Certainly --

MR. POLLACK: Objection to the form of the question, hypothetical. The vote was not in the way in which you pose it. And for that reason I think that the question is hypothetical and improper in form.

MR. TERSIGNI: He says he had an opinion, and he says his opinion was that there would have been nothing preventing him from continuing, even if they had decided to sue.

Q Did you give any consideration at the time, Mr. Haire, to whether or not Anchor could properly, effectively and meaningfully continue to serve this fund if the directors had decided that the litigation should proceed?

MR. POLLACK: I object to the form of the question.

Q You may answer.

THE WITNESS: Would you reread the question?

(The pending question was read.)

A I have never at any time had any doubt that we could continue to effectively serve the fund, if we were requested to continue or permitted to continue by the board or the shareholders.

Q And that would be true whether or not the lawsuit were permitted to go forward; is that right?

A The lawsuit would have been disruptive, but we could have continued to serve.

Q Did you express that opinion to the five directors who were making the decision?

MR. POLLACK: At what time, Mr. Tersigni?

MR. TERSIGNI: Any time prior to January 6, 1975.

MR. POLLACK: The opinion that it would be disruptive?

MR. TERSIGNI: Mr. Pollack, you are really not furthering this examination. Let me rephrase the question.

Q Did you at any time prior to January 6, 1975, express the view to the five directors we are talking about that Anchor could continue to give meaningful service to the fund, even if the lawsuit were permitted to proceed? Did you express that view to them?

A I certainly never expressed any contrary view, because I had not considered that possibility.

Q You had not considered what possibility?

A The possibility of the board's terminating our contract because of this lawsuit.

Q Did you consider the possibility that those five directors might have opted in favor of the lawsuits being permitted to continue?

A Certainly.

Q Was it your belief that even though they might decide to permit it to continue, that they would never consider terminating your contract?

A As I earlier testified, I would have argued strongly, had I known they were considering termination, that they should continue the contract.

Q Did they ever inform you that they were considering the possibility of terminating your contract in the event that they decided the lawsuit should continue?

A No, they did not.

Q Did anyone, other than the five directors, ever notify you that they were giving consideration to that subject?

A No, they did not.

Q I would like to read further to you from the memorandum of Mr. Souther, which has been marked Plaintiffs' Exhibit 4 for identification, page 5:

"If the period required for approval of the new advisor exceeded the 60-day notice period under the agreement, or if Anchor ceased to render services during such period, the board would have to assume full responsibility for administration of the fund, including portfolio transactions, accounting, legal, regulatory, and general corporate matters."

Do you agree with that statement?

MR. FRIEDMAN: I object to the question.

MR. POLLACK: Mr. Tersigni, the memorandum from which you are reading is a memorandum addressed by Mr. Souther, counsel to

Q Did you discuss with anyone, or did the board discuss, whether or not Anchor and the individual defendants in this action should execute waivers of the statute of limitations?

MR. POLLACK: Same direction.

I have a running objection to this line of questioning, Mr. Tersigni.

MR. TERSIGNI: I have no problems with running objections, but you have apparently a running instruction.

Q Mr. Haire, did the board consider, at or about the time that the Welch action was commenced, how ultimately the decision would be made by the fund whether or not to proceed against you and Anchor and the other defendants in this case?

MR. POLLACK: Same direction.

Q Mr. Haire, I would like to read to you from an affidavit of Mary O'Connor -- she's one of the so-called disinterested directors, was she not?

A She was.

Q Was she a director in November of 1970?

A No.

Q But you are aware that she filed an affidavit with the court in 1973, are you not, sir?

A Not of my own knowledge.

Q Are you aware that you filed an affidavit adopting her affidavit?

A I have not reviewed those documents, which are now three years old. I recall there were documents filed at that time.

MR. FRIEDMAN: Mr. Tersigni, the record of what was filed in court will speak for itself. I don't think there is a need to pursue this question.

Q Let me show you a copy of an affidavit purportedly signed by you and dated June 21, 1973.

Do you recall signing that affidavit?

MR. SOUTHER: I would note for the record that your statement was incorrect, Mr. Tersigni, when you said that he, Mr. Haire, filed an affidavit adopting the affidavit filed by Mrs. O'Connor.

MR. POLLACK: I concur in the statement by Mr. Souther. This affidavit that you have shown Mr. Haire doesn't refer to the affidavit of Mrs. O'Connor in any way.

MR. TERSIGNI: Could I have it back, please?

And I think I am entitled to know what motivated Mr. Haire, and what motivated Mr. Haire is directly relevant to the matters that I have been inquiring about that related to his own possible exposure as a defendant, a matter which the selectees would ultimately pass upon.

Are you going to let him answer?

MR. POLLACK: No.

MR. TERSIGNI: Are you going to produce the minutes?

MR. POLLACK: We will take your request under advisement.

BY MR. TERSIGNI:

Q Mr. Haire, do you sit on the directors' qualifications committee for Fundamental and the other six funds that we have been talking about, which are part of the Anchor group?

A Yes, I do.

Q How long has that committee been in existence?

A Since mid-1971.

Q Did it have a predecessor?

A No.

Q How were directors' qualifications determined prior to 1971?

MR. POLLACK: I object to the question as irrelevant, and I instruct him not to answer.

MR. TERSIGNI: I think it goes to what the function and purpose of this committee was.

MR. POLLACK: Why don't you ask him what the function and purpose of the committee was?

MR. TERSIGNI: Because I want to ask him what I asked him. That's relevant to that question.

MR. POLLACK: I disagree. We are not examining ancient history in this case.

Q Immediately prior to the inauguration of the directors' qualifications committee in 1971, how were directors' qualifications passed upon?

MR. POLLACK: Same direction.

Q Pursuant to whose direction was the directors' qualifications committee established?

A At the direction of the board of directors.

Q Who proposed that there be such a committee, if anyone?

A No one really proposed it. The origins of the committee were the fact that at the shareholders' meeting of Fundamental held in June of 1971, at which almost all, if not all of the directors were present, the shareholders raised questions with regard to selection of directors, particularly why we did not have a woman on the board, and out of the board discussion of that stockholders' meeting the directors' qualification committee was established.

Q Did anyone propose such a committee to the board of directors?

A I have just stated that the discussion was of the events at the stockholders' meeting, and from that discussion the directors' qualification committee emerged. I do not recall now, five years later, whether somebody specifically suggested that. It seems to me an obvious way to formalize and meet an objection that came up at the stockholders' meeting.

Q Isn't it a fact that there was a special committee appointed, in or about 1967 or 1968, to review and consider membership and composition of the board of directors of the fund?

MR. POLLACK: 1967 you are now

asking about?

Q Wasn't such a committee organized in 1967 and '68, and wasn't it in existence as of 1971?

MR. POLLACK: I don't see what the events of 1967 have to do with anything in this case.

MR. TERSIGNI: Do you direct him not to answer?

MR. POLLACK: I do.

MR. TERSIGNI: You direct him not to answer?

MR. POLLACK: I said, I do.

Q When was that initial special committee terminated?

MR. POLLACK: Same direction.

Q Who determined the membership of the qualifications committee as of the time that it was originally organized?

A It was set by the board at that meeting.

Q Did someone make a proposal?

A I don't recall the discussion. As I say, the committee emerged from the discussion of the board.

Q Would that have been the board's meeting of July, 1971?

A That's correct.

Q Were there minutes kept of that meeting?

A Yes, there were.

MR. POLLACK: We produced those minutes for you, Mr. Tersigni.

MR. TERSIGNI: I think you gave us excerpts of those minutes.

MR. POLLACK: We gave you the sole portion of the minutes that relates to this issue.

MR. TERSIGNI: You gave us excerpts, and I do recall that we got something.

Now that you mention it, Mr. Pollack, I don't know what you gave us. Why don't we mark this for identification, and maybe you can tell us what you gave us.

MR. SOUTHER: What I gave you.

MR. TERSIGNI: What you gave Mr. Pollack and Mr. Pollack gave us, or however we got it.

MR. POLLACK: Mr. Souther produced it for you.

MR. TERSIGNI: Maybe Mr. Souther can

tell us what this is.

(Document entitled "FI Minutes-July 28, 1971," marked Plaintiffs' Exhibit 5 for identification, as of this date.)

MR. POLLACK: For the record, Mr. Tersigni, I passed on to Mr. Souther the request by Mr. Sweet, and Mr. Sweet also made it by letter for such minutes. There was a discussion between and among us regarding the fact that subjects that were not relevant to the lawsuit would not be produced. And these first two entries on this document are the excerpts of the minutes of those meetings of July 28, 1971, and October 20, 1971, which related to the subject of the directors' qualifications committee.

MR. TERSIGNI: I am not so sure they are excerpts, Mr. Pollack, and I would like a statement from Mr. Souther as to what this document is.

MR. POLLACK: I don't believe Mr. Souther is a witness in this proceeding. I don't know that he has any obligation to make any statements. But I am sure if you were to direct the question to him, orally or by letter, that he would say the same thing that I have just said.

MR. TERSIGNI: Mr. Souther, could we have a statement for the record what this document is?

MR. SOUTHER: Mr. Pollack has just told you.

MR. TERSIGNI: Can you tell us, these appear to me -- this one page appears to contain a summary of certain portions of the minutes for these two particular meetings, July 28, '71, and October 20, '71; is that correct, or is this supposed to be some sort of quotation?

MR. POLLACK: Your surmise is incorrect. It's verbatim from the minutes.

MR. SOUTHER: I am informed and believe that it's verbatim, extracted from the minutes of each of those days.

MR. TERSIGNI: I take it someone -- reviewed the minutes, and that the representation is being made that this is the only portion of those minutes that relate to this question?

MR. POLLACK: That's correct.

Q These excerpts, the portion for July 28, '71, refers to the president -- do you have a copy,

Mr. Haire?

A I do now.

MR. SOUTHER: Are you going to mark this?

MR. TERSIGNI: It's marked.

Q It says, "The president then referred to the questions raised by the stockholders."

Was that you? Were you the president?

A That is correct.

Q So it was you that brought the matter up before the board; is that right?

A Correct.

(Continued on page 116.)

Q Did you make any statement to the board whether you were in favor of or opposed to this suggestion?

A I'm sure that I said to the board that I thought it would be a good idea.

Q And prior to this meeting, had you given thought to who should be on this committee?

A I would think only to the extent that I felt that since its function was the selection of disinterested directors, that the majority of the committee should consist of disinterested directors.

Q Did you recommend who specifically should be on the committee?

A No, I don't believe that I made such a recommendation. The decisions as to how big the committee should be, and who should be on it, was left entirely to the board, as I recall.

Q Did you make any recommendation whether the committee should consist of three, four, five, six, seven, eight, or more, directors?

A No, I did not.

Q Who suggested that there should be three directors, and that it should be Messrs. Burks, Phillips and Haire?

A As I said, I don't know that anyone proposed it. To the best of my recollection, I did not propose it. The committee of three, it seems to me, seems to be the logical minimum you can have on a committee.

Q You don't remember who suggested that these three individuals ought to be the members of the committee?

A No. Dr. Burks was at that time, I believe, the senior disinterested director, and was approaching retirement age, as this minute indicates.

So it seems to me that this was -- the size and the makeup of the committee, to the best of my recollection, emerged from the discussed at the board meeting.

Q Did you believe that it was appropriate for you to be on the committee?

A Yes.

Q Why?

A Because I am the chief executive officer of the fund.

Q Did you believe that the other two members of this committee should be outside directors?

9

A As I stated earlier, I believe that

a majority of this committee should be outside directors. If the committee was to be three, then the other two were appropriately in that category.

Q Why did you believe that? What was your reasoning?

A Since its function is to pass upon the qualifications of the director candidates suggested to it by a variety of people, it was appropriate that the committee not consist of a majority of affiliated directors.

Q Prior to this time, had any of the unaffiliated directors been involved in the selection process for directors?

A Yes.

Q How had they been involved?

A ~~They had --~~ Whenever there was a vacancy on the board, the entire board was solicited for thoughts as to candidates, and the decisions were made by the board as a whole, rather than by virtue of a specific committee charged with that assignment. 9

Q How long had Mr. Burks been a director as of the time that he was elected to this committee?

A I don't recall. His service on the board as a director predates my services.

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Q How long have you known Mr. Burks?

A Since he came to Elizabeth in 1959 or 1960. He's a resident of Elizabeth, New Jersey.

Q Is he a neighbor of yours?

A We live in the same town. Not a neighbor of mine.

Q Do you socialize with him?

A I've been to his house; he's been to mine.

Q Do you consider him a friend of yours?

A I consider all of the directors of this fund friends of mine.

Q If you will simply answer my questions --

A Yes.

Q Do you consider him a close friend?

A No.

Q Mr. Burks is a defendant in this case, as you are; is that correct?

A That's correct.

Q Do you know who suggested Mr. Burks for the board of directors?

A As I have said, his service on the board predates my own.

Q Does that mean the answer to the question is you don't know?

A I was not in on any discussions at the board when his name came up. He was known to me. Because he was a prominent person in Elizabeth, he was known to others.

Q That's not my question. My question is, do you know who suggested Mr. Burks for membership on the board?

A No.

Q Mr. Charles Phillips was also elected to this committee initially; is that correct?

A That's correct.

Q How long had Mr. Phillips been a director as of that time?

A I believe he came to the board in 1967.

Q Do you recall who suggested him for membership on the board?

A I believe that I did.

Q How long have you known Mr. Phillips?

A I had never known him prior to the time he was considered for the board.

Q How did you come to recommend him for the board of directors?

A His name was suggested to me by a public relations firm which was working with us at the time, and I had indicated to the head of that firm that we were on the lookout for well qualified outside directors.

He suggested that Dr. Phillips was well qualified, that he was on a great many boards, that he was a member of the board of governors of the American Stock Exchange, and said if I would like to meet Dr. Phillips, he would arrange to introduce me to him, which he did.

Q And that was in '67?

A That is correct.

Q So as of the creation of this committee, you had known him and worked with him for approximately four years or so?

A Only as a director of the fund.

Q When you were appointed to this committee, together with Mr. Burks and Mr. Phillips, you knew, did you not, that at some point in the relatively near future the board of directors planned to make a decision with respect to what, if any, legal action should be taken against you, and perhaps certain other individuals?

MR. POLLACK: I object to the question.

I direct the witness not to answer.

I would have no objection to your asking it in that form.

MR. TERSIGNI: Let me rephrase it.

BY MR. TERSIGNI:

Q When you took your position on this selection committee or qualifications committee, Mr. Haire, you knew, did you not, that people that this committee recommended might in the future be asked to consider what, if any, legal action the fund should take against Anchor and yourself?

MR. POLLACK: Objection.

MR. SOUTHER: You mean insofar as they be directors?

MR. POLLACK: If you wish to ask whether he considered it as a factor in taking office on that committee, or as a factor in who was nominated by that committee to serve as directors, I have no objection. But in its present form I think it's highly misleading and objectionable.

MR. TERSIGNI: Do you direct him not to answer?

MR. POLLACK: I do.

Q On July 28, 1971, did you know, Mr. Haire, that subsequent to the resolution of the Goldman, Sachs action the board of directors would consider what, if any, action Fundamental should take against you and Anchor?

A I knew that, yes.

Q Did it occur to you that directors appointed or recommended by this qualifications committee might participate in that decision?

A No, it did not cross my mind.

Q Who did you believe would make that decision?

A All of the outside directors.

Q Was it your understanding that that would be a question which would be submitted to the outside directors and not to any other directors?

A Yes.

Q Did you have any understanding who those outside directors would be?

A No, I had no understanding of who they would be.

Q You knew who they were at that time?

A That's correct.

Q But you didn't know who they might be in a year or two thereafter, when that decision might actually be made; isn't that true?

A No more than I knew anything else that would occur in the future.

Q But you did know that whoever they might be, if they took their seats subsequent to July 28, 1971, they would be passed upon by this committee?

MR. FRIEDMAN: I object to form.

MR. SOUTHER: And I also point out that there was no understanding at that time that there would ever have to be a decision.

MR. TERSIGNI: He just said there was. He just testified to that.

MR. SOUTHER: No.

MR. FRIEDMAN: I would like to add to Mr. Souther's comment that not only was it not known that there would have to be a decision on the continuance of the litigation, it was also not known how many or whether any additional directors would be coming on the board.

MR. TERSIGNI: No. 1, he just testified to the contrary.

No. 2, I read to you Mrs. O'Connor's affidavit, which says, in substance, right from

BY MR. TERSIGNI:

Q I think you have already testified that Mr. Burks, who was initially a member of the committee --

MR. POLLACK: Mr. Tersigni, I think this business of asking the witness who is a defendant in this case, in a situation where you have filed the complaint, is most objectionable. You know who the defendants are.

MR. TERSIGNI: I am trying to find out if he knows.

A I testified, I think, four times today, that Mr. Burks is a defendant in this case.

Q How about Dr. Phillips?

A I've also testified to that.

Q Who was the first director recommended by the committee, the qualifications committee, after its inauguration in July of 1971?

A Mr. Laun.

Q Who recommended Mr. Laun?

A Dr. Phillips.

MR. TERSIGNI: By the way, who furnished this to me? Is this Mr. Souther, too?

MR. SOUTHER: All the documents which you received in the past week were furnished to your partner, Mr. Sweet, by the two covering letters.

MR. TERSIGNI: Let's mark this one for identification.

(Document entitled "Directors' Qualifications Committee---Membership," marked Plaintiffs' Exhibit 6 for identification, as of this date.)

BY MR. TERSIGNI:

Q I show you Exhibit 6 for identification, which has been furnished by Mr. Souther, and I ask you whether you can confirm the accuracy of the committee makeup and terms reflected on that document.

A To the best of my recollection, the individuals named on this sheet were the members of the directors' qualifications committee on the dates that are shown.

Q And the last committee makeup, which is labeled June 26, 1974, is that still current?

A No, it is not, because Dr. Kemmerer is no longer on the board.

Q Who has replaced Dr. Kemmerer?

A The committee now consists of Mrs. O'Connor as chairperson, Dr. Phillips, Miss Robichaud, and myself. It has been enlarged to four because it has been consolidated with the corporate responsibility committee, which was formerly a separate committee, of which Mrs. O'Connor was chairperson.

Q When did that composition change?

A ~~At the last~~ At the first directors' meeting following the 1975 stockholders' meeting.

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Q Which would have been in July of '75?

A I would guess sometime around there.

Q But until July of '75, the last composition indicated and labeled June 26, '74, would have been current?

A That's correct.

Q Let us get back to Mr. Laun.

To whom did Mr. Phillips recommend Mr. Laun?

A To the persons who were then on the committee, namely, Dr. Burks as chairman, and Dr. Phillips and myself.

Q Did he discuss it with you prior to any formal committee meeting?

A No. He discussed it at the committee.

Q When did you first find out that Mr. Phillips was recommending Mr. Laun?

A At a committee meeting. I can't place the date.

Q Do you know how long Mr. Phillips has known Mr. Laun?

A A good many years.

Q What did Mr. Phillips say in support of Mr. Laun's qualifications?

A Mr. Laun was at that time vice president of Celanese Corporation. He had had a long career in the textile business.

Dr. Phillips had first known him when he was an executive of a textile company with a plant in the State of Maine, as I recall it, where Dr. Phillips was at that time president of Bates College, so that he could testify as to his experience in industry and his capacity and qualifications as a director.

Q How long had Mr. Phillips been a director as of 1971, when he recommended Mr. Laun?

A Four years.

Q Did he participate in the October 28, 1970 meeting of the board relating to what legal action, if any, should be taken with respect to the Penn Central matter?

MR. FRIEDMAN: Objection.

MR. POLLACK: Objection.

I direct the witness not to answer.

BY MR. TERSIGNI:

Q When Mr. Laun was proposed by Mr. Phillips, who was about to leave the board, if anyone?

A I don't recall that anyone was. I think it was just -- I don't recall anyone was.

Q Did Mr. Laun eventually take a seat on the board?

A Yes, he did.

Q When was that?

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A I think it was November '71, but I don't KNOW- the records would reflect when that was.

Q Did the committee have any discussions with proposed candidates on the subject of what they might be asked to do as directors, and what their duties and functions would be, and so forth?

A The committee met with each of the prospective directors, not only to familiarize themselves with the individual and ask him or her questions, but also to answer any questions that the candidate might have with regards to their duties and responsibilities as directors.

Q Was an explanation given to them of how the fund operated, and what the relationship was between Anchor and the fund, and so forth?

A Yes.

Q Were the candidates told that there was an open question with respect to what action, if any, the board should take against Anchor or its principals in connection with the Penn Central lawsuit?

A No.

Q Was there any discussion of whether incoming directors ought to be told about that?

A The matter is a matter of record in either the prospectuses, or the proxies, or the annual reports of the fund, all of which were furnished to the directors. If they had any questions after reading those documents, I'm sure they would have asked them.

Q Was the decision of the board of directors in October or November of 1970 to defer consideration of legal action against Anchor ever disclosed to the stockholders?

MR. POLLACK: Objection, and I direct the witness not to answer.

MR. TERSIGNI: What's the basis for that?

of the potential candidates for directors?

THE WITNESS: Never.

BY MR. TERSIGNI:

Q Why was that not told to incoming directors, specifically, that one of the things that they might participate in deciding was whether you should be sued?

A There was no certainty that that decision would ever have to be reached. We had brought an action against Goldman, Sachs to recover the full amount of our loss.

Q There was no certainty that it could be avoided, was there?

A No, no more than there was certainty about anything else.

Q In fact, the board had decided to hold off on making that decision until the outcome of the Goldman, Sachs action had been determined; isn't that true?

A That's correct.

Q And you knew about that because you were on the board when that decision was made?

A I've already testified to that.

Q And you have already testified that

it was at least conceivable that depending on the outcome of the Goldman, Sachs action,somebody on this board would have to decide whether you should be sued, and whether Anchor should be sued; isn't that right?

A That is correct.

And I've also testified that that matter was not discussed with director candidates, nor was it in my mind at the time.

Q My question is, why didn't you tell Mr. Laun that one of the things he might have to decide was whether or not you should be sued?

MR. SOUTHER: I object to that. The witness has just said that it wasn't in his mind at the time.

If it wasn't in his mind, he couldn't conceivably have told Mr. Laun.

Q Did you believe that was a relevant topic to discuss with Mr. Laun?

A If I had felt it were relevant, I would have discussed it with him.

Q Does that mean that you considered it irrelevant?

A It was not discussed with Mr. Laun.

It was not a factor in my consideration of him as a candidate.

Q Did you give any thought, subsequent to October and November of 1970, when the board authorized the Goldman, Sachs action and deferred on the rest of it, did you at any time subsequent to that give thought to what the implications might be with respect to you and/or Anchor in the event that the fund eventually decided to bring suit against you? Did you ever think about that?

MR. POLLACK: Mr. Tersigni, what has that to do with the relationship of the minority directors and the qualifications committee?

MR. TERSIGNI: Well, the minority directors were selected in all instances by a committee consisting entirely of defendants, or if not entirely of defendants, of a majority of defendants.

Those people subsequently decided that there should not be legal action against the people who had recommended them for membership.

I think it's very relevant to know what the state of mind, what the motivation was, so on and so forth, when these people were selected,

AFTERNOON SESSION

(2:05 p.m.)

JOHN R. HAIRE, resumed, and testified further as follows:

MR. TERSIGNI: Can we have this marked as Plaintiffs' Exhibit 7 for identification.

(Document entitled "Louis F. Laun," marked Plaintiffs' Exhibit 7 for identification, as of this date.)

MR. TERSIGNI: Mr. Souther, do you want to state for the record what this is? I think we got it from you.

MR. SOUTHER: I don't know whether it's appropriate for me to be stating things for the record. I am not a witness here.

But you did ask for certain information with respect to fees received by members of the five disinterested directors. And this is in partial response to that.

MR. TERSIGNI: I think we asked for more than is shown on this exhibit. But, at any rate, let me question the witness about this.

CONTINUED EXAMINATION
BY MR. TERSIGNI:

Q I show you Exhibit 7 for identification, which is a schedule, captioned "Louis F. Laun," and as I read it, it purports to say that for the calendar year 1974, Mr. Laun received regular fees of $9475, and for the calendar year 1975 regular fees of $8825, and $600 for the committee of disinterested quorum.

Are you able to tell us whether that is correct?

A No, I'm not, not of my own knowledge. I have no reason to think it isn't, but I cannot confirm it.

Q Do you know what Mr. Laun was paid for 1971?

A I have no idea.

Q Or 1972?

A Not for any period would I know that.

Q Or '73, of course.

Who could furnish that information to us?

A The treasurer of the fund.

Q What's his name?

A Mr. Kesselhaut.

MR. TERSIGNI: Mr.Souther, this also, even for the calendar year '74 and '75, does not seem to include any compensation for committee is here to testify about facts. And this is not material he prepared or has any firsthand knowledge about.

MR. TERSIGNI: I asked him, and he said he didn't, and that's why I addressed the request to counsel.

MR. POLLACK: Why don't you hold the requests until after the deposition?

MR. TERSIGNI: I am going to state them on the record. If you direct me not to, you can do that.

MR. POLLACK: I can't direct you not to do anything.

MR. TERSIGNI: Let's get on with it.

MR. POLLACK: I request that you hold your document requests until later.

BY MR. TERSIGNI:

Q When did Mrs. O'Connor come onto the board, Mr. Haire?

A In June of 1972, I believe.

Q Who recommended her?

A Mrs. O'Connor was known to both Dr. Burks, who was chairman of the directors' qualifications, and to me. She is a resident of the Elizabeth area, as are Dr. Burks and I.

He had known her longer than I. I don't recall particularly who one would say proposed her. We were looking, as I indicated earlier, for a woman director, and she was highly qualified.

Q How long have you known her?

A Oh, a number of years.

Q More than twenty?

A Oh, no, no.

Q More than ten?

A Yes, somewhere in that neighborhood.

Q Between ten and twenty?

A Somewhere in the neighborhood of ten yearss.

Q Do you know how long Dr. Burks has known her?

A A great deal longer than that. At least thirty years.

Q Thirty years?

A Yes.

Q Do all three of you live in the same community in New Jersey?

A Mrs. O'Connor lives in Elizabeth, and Mr. Burks and I live in the adjoining town of Hillside.

Q Were you social friends prior to the time that she was suggested for membership on the board?

A I knew Mrs. O'Connor as a prominent person in the Elizabeth community, first of all; and, secondly, I had attended various functions and parties in the community at which she was present.

Q Did you consider her to be a friend of yours?

A Yes.

Q Close friend?

A No.

Q What about her husband; do you know what her husband was?

A Her husband is deceased.

Q Was he deceased at the time she was proposed for --

A Oh, yes. I've never known her husband.

Q Do you know whether she is a close friend, or whatever the relationship might be betewen her and Dr. Burks, other than you have already described?

A I'd have to leave that characterization to Dr. Burks.

Q At the time that Mrs. O'Connor was

suggested for membership on the board, was there an anticipated vacancy?

A There was. Dr. Burks himself was about to reach retirement age.

Q Would it be fair to say that Mrs. O'Connor was being suggested as a successor to Dr. Burks?

A He was retiring, and she was the only candidate named, so one could characterize that any way one wants.

Q Did it occur to you at that time that Mrs. O'Connor might be at some point in the future asked to decide whether Dr. Burks should be sued?

A I've already stated no, that --

Q We are talking 1972 now.

A The answer is no, it did not.

Q Did you know in 1972, when Mrs. O'Connor was being proposed, that there would be a decision made, possibly in the future by the board, with respect to whether Dr. Burks should be sued?

MR. POLLACK: Did he know; is that the question?

MR. TERSIGNI: Yes, did he know.

MR. POLLACK: I object to the form of the question.

MR. TERSIGNI: What possible objection? He either knew or he didn't know.

I assume the witness, who is an attorney, can say he either knew or didn't know.

MR. POLLACK: If you wish to say did he consider the question, did it cross his mind, and then you wish to ask him what consideration he gave to it, I have no objection.

MR. TERSIGNI: I will leave that to cross-examination.

BY MR. TERSIGNI:

Q My question is did you know that, and I would like an answer unless your lawyer instructs you not to.

MR. POLLACK: I will oblige by instructing him not to answer.

Q Did you believe that the board would, in the foreseeable future, be asked to determine whether or not Dr. Burks should be sued?

A The thought that Dr. Burks or any other outside director of the fund would be sued over this issue did not cross my mind.

Q Ever?

A Ever.

Q Did the thought that you might be sued ever cross your mind?

A Of course.

Q Did it cross your mind at the time that Mrs. O'Connor was being proposed?

A No.

Q When did it cross your mind?

A The subject of whether Anchor and obviously any of its officers might be defendants had been discussed, as has been referred to here today.

Q It had been discussed as long ago as October of 1970; had it not?

A That's correct.

Q And you had taken part in that discussion?

A I was present at the time.

Q And you recall what the board's decision was at that time?

A Yes, I do.

Q What was that decision?

MR. POLLACK: I object, and I instruct the witness not to answer. We are not relitigating the issues of 1970.

Q Did you have the board's decision in mind during 1971?

A No, I didn't.

Q Did you have it in mind during 1972?

A I did not.

Q Did you have it in mind at any time subsequent to the time that the board made that decision?

A I have been a defendant in derivative litigation since I became a director of this fund. It is an occupational hazard, shall we say. I did not consider this case to be of any more significance in the conduct of my duties that any other litigation in which we have been or were involved.

Q Can you think of any other such case where you were a defendant where it was delegated to a minority of the board or otherwise to determine whether you should be sued?

MR. POLLACK: I object and I instruct the witness not to answer.

MR. TERSIGNI: On what basis?

MR. POLLACK: The question is absolutely irrelevant to the discovery as framed by Judge Werker.

Q Did you discuss with Mrs. O'Connor, at the time she was being considered for nomination to the board, that she might be asked to participate in a decision whether you, Dr. Burks and Mr. Hopkins, or anybody else, should be sued?

A I did not.

Q Was there any reason why you did not discuss that with her?

A I've already testified, I did not CONSIDER IT AT THAT TIME.

Q We are now speaking about Mrs. O'Connor.

A The same answer is applicable. I did not consider it at that time.

Q By the way, was it important to you whether or not the fund would decide to sue you or Anchor?

A I would have to say yes.

Q Do you recall considering the implications of that possibility from time to time?

A I don't recall specifically considering it.

Q Did you generally consider it?

A Obviously, no one is anxious to be sued.

Q Why was it a matter of importance to you?

MR. POLLACK: I object to the form of the question.

Q What was the importance of that subject to you?

A I think the importance of it is that no one likes to be accused of having done something which is not proper.

Q And financially, did that have implication to you?

A Not really tremendously, because I was satisfied in my own mind that I had not conducted myself in any way for which I was personally liable.

Q What about Anchor; did you satisfy yourself about Anchor?

A I'm satisfied about that, and always have been.

Q And other employees of Anchor?

A Same way.

Q So you had no concern about the subject?

A I didn't say that.

Q What was the reason for your concern?

A I've already told you.

Q Did you ever express this concern to anyone?

A Which concern, and anyone is a large universe.

Q Yes, it's very large.

A I'm sure I expressed many times to my wife the fact that I would not like to be a defendant in a lawsuit of this sort.

Q How about to other people at Anchor?

MR. POLLACK: Mr. Tersigni, move on, please, to something relevant, will you?

MR. TERSIGNI: Yes, I am on something relevant.

MR. POLLACK: I direct him not to answer.

Q Did you ever express it to any of the candidates that were being considered by the qualifications committee?

A Absolutely not.

Q Did you ever express it to any fellow defendant in the case?

A No.

Q You never expressed it, for example, to Mr. Phillips?

A No.

Q Or Mr. Burks?

A No.

Q Or Mr. Burr?

A The subject was not discussed among us.

Q Or Mr. Kemmerer?

A I say no to all of them.

Q Do you recall expressing it to anyone other than your wife?

A Not that I recall.

Q I don't recall whether you stated when Mrs.O'Connor took her seat on the board in '72.

MR. POLLACK: He did.

A June 1972.

Q Do you recall how much her compensation was for 1972?

A I have no idea.

Q That would be true of '73, '4 and '5?

A That would be true not only of her, but of all of the directors. Those are questions I cannot answer.

MR. TERSIGNI: May we have this marked for identification.

(Document entitled "Mary O'Connor," marked Plaintiffs' Exhibit 8 for identification, as of this date.)

MR. TERSIGNI: For the record, I will state that Exhibit 8 for identification was furnished to us in the same way as Exhibit 7, and I make the same requests for supplementation of 8 that I did with respect to 7.

BY MR. TERSIGNI:

Q Who was on the committee, Mr. Haire, that recommended Mrs. O'Connor?

And if 6 will help you, I will show you that.

A The recommendation was made at the time the committee was the same as it was in the case of Mr. Laun, namely, Dr. Burks, Dr. Phillips, and myself.

Q As of June 28, 1972, Dr. Kemmerer had replaced Dr. Burks on the committee; is that correct?

A That's correct, but that was after her election to the board.

Q Was that more or less immediately after Mrs. O'Connor --

A The change was made at the organization meeting of the board following the stockholders' meetings that morning in which she was elected a director.

Q What were the reasons for that change?

A Dr. Burks had gone off the board.

Q As of when? As of that morning?

A Yes.

Q Who proposed Dr. Kemmerer to replace

Dr. Burks?

A Dr. Kemmerer was the senior director following Dr. Burks.

Q My question was who suggested him as a successor.

A It had been the custom, starting with Dr. Burks, to name the senior outside director as the chairman of that committee.

Q What about Mr. Hopkins; when did he come onto the committee?

A I don't recall precisely when he came on the board, but it was sometime in the 1960s.

Q Apparently, from Exhibit 6, Mr. Hopkins and Dr. Kemmerer both came onto the qualifications committee at the same time.

A That is correct.

Q Am I reading that correctly?

A You are reading quite correctly.

Q Was Dr. Kemmerer senior to Mr. Hopkins? I take it he was.

A Yes, he was.

Q And Mr. Hopkins replaced Mr. Phillips?

A Right.

Q What was the reason for that?

A Dr. Phillips became chairman of another one of the committees.

Q Was there any discussion about whether Dr. Phillips should cease serving on this committee and serve on some other committee?

A I don't recall. He was named as chairman of another committee, and the board has tried to allocate the various committee assignments so that no one is on too many committees, particularly chairmen.

Q My question is, why did he leave this committee and go to another committee?

A Because there was a vacancy on another committee as chairman, and he had not up to then, as far as I can recall, been chairman of a committee.

Q And Mr. Hopkins replaced Mr. Phillips.

Where did Mr. Hopkins stand with respect to seniority? Was he the third most senior?

A He was pretty senior. I can't, in 1976, recall whether he was third, or second, or what he was.

Q Was it the custom that the most senior outside director would be chairman, and then the next most senior a member of the committee? Was that the custom?

A No.

Q Just as to the chairmanship?

A That's right.

Q As to the other slot, anyone could be suggested?

A I would say so.

Q What were the reasons for suggesting Mr. Hopkins?

A I told you, I haven't any idea, other than a proportionate sharing of the various committees assigned.

Q Who would have made that decision, in any event, the board?

A Yes.

Q And you were on the board?

A Certainly.

Q But you don't recall what the reason was?

A No, not other than what I have just stated, namely, to see that the number of positions on various committees were equitably apportioned among the members of the board.

Q When did Miss Robichaud become a member of the board?

A September 1973.

Q Who recommended her?

A Mrs. O'Connor.

Q Was Miss Robichaud also a friend of Dr. Burks?

A No.

Q How is it that you know that, sir?

A For one thing, Dr. Burks wasn't on the board any longer.

Q But I assume he still had friends.

MR. POLLACK: Come on, Mr. Tersigni, please.

A To the best of my knowledge, they had never met. Miss Robichaud, as far as I know, never met anyone who had any connection with Fundamental Investors, with the exception of Mrs. O'Connor, who proposed her. She had never met any other director or officer of the company.

Q To whom did Mrs. O'Connor recommend her, specifically?

A The committee.

Q All three at the same time; is that it?

A Well, I don't know whether we were all three standing or sitting in one place when she proposed her.

Q I would dare say she may have had some discussion with members of the committee individually before some formal meeting.

A The subject of director vacancies was a subject known to the board. The board knew that certain directors were going to be leaving the board, and a request was made, undoubtedly by the chairman of the directors' qualification committee, that if any member of the board has any suggestions with regards to prospective candidates, please let us have them.

Q Do you recall the first time you discussed with Mrs. O'Connor her recommendation of Miss Robichaud?

A No, I don't.

Q Do you recall whether you had any such discussion with her prior to a formal meeting of the qualifications committee?

A To the best of my recollection, I had no private discussion with Mrs. O'Connor with regards to Miss Robichaud.

Q As of September 1973, the Lasker case had been filed in the court; isn't that right?

MR. POLLACK: You would know that,

wouldn't you, Mr. Tersigni?

MR. TERSIGNI: Yes, I would know, but I am trying to find out what the witness knows.

MR. POLLACK: I think you ought to pass on to something else.

MR. TERSIGNI: Are you directing him not to answer?

MR. POLLACK: I am.

BY MR. TERSIGNI:

Q At the time that Mrs. O'Connor made this recommendation, were you aware that the Lasker case had already been filed?

A I can't tell you now, but if, as you just stated, it was filed before that date, then I obviously was. But I don't recall the sequence of dates in 1976.

Q Can you recall a time when you were first notified that the case had been filed and that you were a defendant?

A I'm sure it was a few days after it was filed, but what date that was, I have no idea.

Q Whatever date it was, can you recall finding out that such case had been filed and that you were a defendant?

A Yes.

Q You remember that?

MR. POLLACK: Do you mean does he have a specific, specific memory?

A I don't have a specific recollection of somebody walking in and saying, "Here's a document."

I know the case has been filed. I know I'm a defendant in it. But I don't have any recollection of when it happened, or where I was.

Q Do you recall how you found out?

A No.

Q Do you recall being served with process?

A No. That doesn't mean I wasn't. I just don't recall it.

Q Do you recall discussing with anyone the fact that you were named as a defendant?

A I have no recollection of it.

Q Are you able to tell me whether you ever discussed it with anyone?

A Of course I must have discussed it with anyone. But I have no recollection of whom I discussed the case with.

Q Did you discuss it with other defendants, for example?

A I undoubtedly did. It was obviously reported at the very next board meeting. There was a discussion at that meeting. We have had continuous meetings with counsel and with others in connection with the case. The times that I have discussed it with, quote, anyone, must be a number in the several hundreds.

Q Right now we are talking about other defendants, discussing it with other defendants. Like Mr. Kemmerer, for example.

A I have never discussed the case, that I can recall, with any defendant, other than discussions which have been held in board meetings, and which are as recorded in the minutes.

Q Whenever such discussions might have taken place, are you able to tell us whether you discussed the case with Mr. Kemmerer, who was also on the committee at this time?

A If the minutes of the board meetings reflect that there was a discussion of the Lasker case and Dr. Kemmerer and I were present at that meeting, then obviously that was when it was discussed.

I have no independent recollection of

when that would have been, nor did I ever discuss the case with Dr. Kemmerer, other than in that context.

Q Forget about what the minutes say. What I am asking you, Mr. Haire, is do you today have a recollection, and are you able to say, whenever it was, that you discussed the case with Dr. Kemmerer, who was also a named defendant?

A All I can do is reiterate the answer I have just given you.

The case was discussed at board meetings at which Dr. Kemmerer and I were both present as part of the board.

Q Would the same hold true of Mr. Hopkins?

A That is correct.

(Continued on page 166.)

Q I will represent to you that the case was filed in February of 1973, and you might want to verify that with your counsel.

As of that time, from Exhibit 6 it would appear that the qualifications committee consisted of Mr. Kemmerer, Mr. Hopkins and yourself.

Was there any discussion, with anyone, whether at a board meeting or otherwise, whether or not it was appropriate for you three gentlemen to continue serving on the qualifications committee in view of the fact that you were all three named as defendants in the litigation?

A There was no such discussion.

Q Did that subject ever occur to you?

A No, it did not.

Q At the time that you became aware that you were a defendant in the case, was it your understanding that at some point in the future the board would make a business judgment with respect to whether or not you should be sued?

MR. POLLACK: At the time that he was sued?

MR. TERSIGNI: Yes.

MR. POLLACK: He had just been sued.

THE WITNESS: I had been sued.

MR. TERSIGNI: Yes, he had just been sued.

Q Did it ever occur to you, when you were informed that you were a defendant, when you first learned of that, that at some point in the future the board would be making a decision whether or not you should be sued?

MR. POLLACK: He had just been sued, Mr. Tersigni. Isn't your question a contradiction of terms?

MR. TERSIGNI: No, I don't think so, Mr. Pollack.

MR. POLLACK: Please move on.

Q At the time you found out you were a defendant in this case, did it occur to you that the board would be making a decision with respect to what position, if any. the fund should take with respect to that litigation?

A No, it did not.

Q Did that thought ever occur to you?

A No, it did not.

Q Never occurred to you that the board would at some point be taking a position with respect to the Lasker litigation?

A Certainly not at that point in time.

Q When did it occur to you?

A At the time after the case against Goldman was settled and we did not recover our full loss, and the board had to focus on it.

Q You recall that back in 1970, when the Goldman, Sachs action was initially authorized, the board deferred what position, if any, it should take with respect to possible claims against you or Anchor; you recall that?

A I do.

Q And you had thought about that at least once between 1970 and the commencement of the Lasker case, hadn't you?

A I never thought of that in connection with the work of the directors' qualification committee. I stated that to you in answer to at least five questions, and I will state it again.

Q Mr. Haire --

MR. POLLACK: Please, Mr. Tersigni, let the witness finish his answer.

Q Are you finished?

A I'm finished.

MR. TERSIGNI: I thought he was finished, Mr. Pollack.

Q I am not asking whether you thought about it in connection with anything specific. I am simply asking you, when you were advised, at or about the time you were advised that this lawsuit had been filed, and you were named as a defendant, did you give thought to the fact that the board would, some time in the foreseeable future, be taking a position with respect to that litigation, or any litigation against you or Anchor with respect to the Penn Central matter?

MR. POLLACK: You have asked that question and he has answered it, clearly and unambiguously.

MR. TERSIGNI: I don't think he has. He said he never thought about that in connection with the qualifications committee. And I am saying to him, please don't releate it to the qualifications committee.

Q I am simply asking you whether you thought about that subject, in any regard.

THE WITNESS: Could we reread the question?

MR. TERSIGNI: Could you reread the question, please?

(The pending question was read.)

THE WITNESS: Would you please read it

another time?

MR. POLLACK: If you don't understand the question, you can ask for clarification.

MR. TERSIGNI: If you don't understand, I can rephrase it.

Would you like me to rephrase it?

THE WITNESS: Yes.

MR. TERSIGNI: At the witness' request, I am going to try to rephrase the question.

Q Without specific reference either to the qualifications committee or any other specific thing or function, what I am asking you, Mr. Haire, is at or about the time when the Lasker case was commenced, in or about February of 1973, and you learned that it had been commenced and that you were named as a defendant, did you give any thought to the fact that in the near or forseeable future the board of Fundamental planned to take a position with respect to that litigation, or any litigation, against you or Anchor, with respect to the Penn Central transaction? Did you think about that subject?

A Not really.

Q Did you ever think about that subject?

MR. POLLACK: Oh, Mr. Tersigni, I will

instruct him not to answer that question.

Q What do you mean by "not really"?

A I mean we were concentrating on the prosecution of the case against Goldman, Sachs, that we believed we had a reasonable prospect of full recovery in that litigation, and that we had postponed consideration of what action, if any, might be taken or might need to be taken until after that matter was resolved.

Q So you were certainly aware that after that matter was resolved consideration would be given to what action, if any, should be taken against you or Anchor?

MR. POLLACK: I object to the form of the question. The proposition is demonstrably false, because at that time they didn't know whether the Goldman, Sachs litigation would result in full recovery or not.

MR. TERSIGNI: I don't know why that makes the proposition demonstrably false.

MR. POLLACK: I think the question is misleading, and I will --

MR. TERSIGNI: The only question was, he knew that after the Goldman, Sachs matter was resolved the board would consider what action, if any, ought to be taken against Mr. Haire. I assume if they collected $29 million, the answer would have been no action.

So why is it demonstrably false, Mr. Pollack?

MR. POLLACK: Please proceed.

MR. TERSIGNI: I'm trying.

Q You did know, at the time the action was filed, the Lasker action, that when the Goldman, Sachs matter was resolved the board would make a decision with respect to what action, if any, should be taken against you or Anchor?

A By that time the Lasker action had been filed and I was already a defendant in litigation that would raise this issue.

Q I understand that. What I am asking you is, you knew, did you not, that the Board was going to take a position with respect to that litigation, after the Goldman, Sachs action was resolved?

A I did not necessarily know that at all. The action was filed and it would have to be dealt with. What action the board would take, if any, I had no idea.

Q I am not asking what action the board would take. You knew that the board would take some action or no action after the Goldman, Sachs matter was completed?

MR. POLLACK: The question was answered. He did not know what, if anything, they would do. I think he answered the question pretty thoroughly. You are trying to change his answer.

MR. TERSIGNI: Mr. Pollack, I appreciate your answer. I don't think you are expediting this.

Q Mr. Haire, I am not asking you if you knew what the board would decide. I am asking you simply whether or not it is not true that at the time the Lasker case was filed, you knew that when the Goldman, Sachs action had been disposed of, the board would take a position with respect to what, if any, action should be taken against you and Anchor.

A No, I didn't know that. I didn't have any reason to assume that the board necessarily would take any action at all.

Q Didn't they decide to consider that subject back in November 1970, when they authorized the Goldman, Sachs action?

A And subsequently a number of the directors had been named defendants in Lasker and were PROBABLY ineligible to determine what the fund's position should be with regard to Lasker. Q

Q But you also knew that there were directors who were not defendants, didn't you?

A If I thought about it, I would have.

Q Wasn't it your understanding, after November of '70, that once the Goldman, Sachs action had been disposed of, that the board, or some part of the board, would make a decision with respect to what action, if any, should be taken against you?

A I answered that no.

Q When did you first become aware, if ever, Mr. Haire, that the board or any portion of the board would take that subject under consideration?

A I would say it was in whatever month it was in 1974, when we settled the litigation against Goldman rather than try the case, July.

Q And what happened at that time?

A We settled the case, and then the board, in its discussion in July, decided to adopt the procedure of asking those directors who were not defendants to consider what action, if any, the fund should take.

Q Who first suggested that that subject be considered?

A The subject inevitably had to be considered.

Q Why? Because it had been decided to consider it back in November of '70; right?

A No, because litigation against Goldman, Sachs had been settled on a basis which did not make the fund whole.

Q Who first raised that subject for discussion after the Goldman, Sachs settlement?

A It was raised at a board meeting. It may well have been I who raised it.

Q Was it raised at any time before the board meeting?

A What do you mean by before the board meeting?

Q Did it suddenly spontaneously come up at the board meeting, or had you given some thought to this subject and had you discussed it prior to the meeting of July 24th, before you raised it in the presence of the full board?

A Well, obviously the board had been advised and, in fact, had authorized the settlement with Goldman, Sachs, and the subject of, shall we say, where do we go from here, obviously was a logical one to be discussed at the July meeting.

Q I'm sure it was a logical one to be discussed. But my question is who raised it, and I think you said it may havebeen you.

Now I am asking you, when did you first broach that subject? Was it for the first time in the presence of the full board, or had you discussed it with someone else prior to that time?

A I'm sure I had discussed it with my associates, Mr. Wickers, and others, prior to the board meeting. I did not discuss it with any member of the board prior to the board meeting.

Q Did you discuss it with any of the defendants in the lawsuit?

A No.

Q Burks, Burr, Chalker, Hopkins, Hutchinson, Kemmerer, Monroney, Phillips, Wade; you didn't discuss it with any of them?

A No.

Q Wtih whom did you discuss it, other than with Mr. Wickers?

A I have no recollection of having discussed it with anyone but Mr. Wickers.

Q When was the first time you discussed it with anyone prior to the July 24, 1974 board meeting, and after the filing of the Lasker action in February of 1973?

A I've already stated it would have been between the settlement with Goldman on July 9th and the meeting on July 24th, and I cannot pinpoint the period any more closely than that.

Q Are you sure it was after the settlement with Goldman, Sachs?

A That's my recollection.

Q When you say after the settlement, what do you mean by that? After the settlement agreement had been signed?

A After July 9th. ~~when we reached~~ 9

Q After when?

A After July 9th. I believe it was July 9th.

Q That's when the formal papers were executed.

A They were executed pretty promptly after any agreement was reached. We were on the eve of trial.

Q Were there back and forth negotiations on settling the Goldman, Sachs case?

A There were.

into a classroom.

Q Did the qualifications committee take a vote in connection with people who were suggested for membership on the board?

A Only in the sense that there was unanimous agreement in every case to make a recommendation.

Q The committee never disagreed?

A If any one of the members of the committee had ~~no, no~~ - AN OBJECTION TO A CANDIDATE THE OBJECTION WOULD BE DISCUSSED BY THE COMMITTEE AND THE VIEWS OF THE MAJORITY PREVAILED. 9

Q The question is did they ever disagree. The answer is "No."

MR. POLLACK: On any candidate?

MR. TERSIGNI: Yes.

MR. POLLACK: On any of the multiple names that were put before the committee?

MR. TERSIGNI: Yes. I am trying to understand whether they always agreed, or whether sometimes there was a divergence of views. It's a simple question.

A All of the recommendations made by the committee were unanimous.

Q I take it that would include nominations other than the five who constituted the so-called disinterested quorum?

A Well, there was only one other nomination during this period that the committee functioned on.

Q Who was that?

A A gentleman by the name of Hobart Taylor, who was on the board for only a year.

Q He was an unaffiliated director?

A He was.

Q And he came on for a year, and then what happened?

A He was elected a director of Aetna Insurance Company, and he had told us at the time of his election to the board that should he be nominated as a director of the parent Aetna Company, he would not be able to serve. Aetna had indicated to him that he would not be able to serve them and our funds.

And when that did occur, as anticipated, he did not stand for re-election.

Q And that was because he was elected to a position with Aetna?

A That is correct. He was a director of a subsidiary company of Aetna at the time he was nominated as a director of the Anchor funds. He said that as a director of the subsidiary, he did not have any problems serving a group of mutual funds and the subsidiary.

But that if he were invited to serve on the parent Aetna board, he would feel that that was an inappropriate duality of directorships, and that he would, therefore, not continue on the board of the Anchor funds.

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Q Was that because of investment policies that he would be passing on as a director of the parent Aetna company?

A He didn't explain what it was, but it was either something of that nature, or the fact that they felt they were competitive in some way with us.

Q I notice that Miss Robichaud was a director of Aetna Life and Casualty Corporation. Was that the same company that Mr. Taylor was referring to?

A That is quite correct. And the reason for the difference is the sequence of events. Mr. Taylor told us when he became a director that if this occurred he would not stand for re-election. Miss Robichaud was a director of the Anchor funds first, and was subsequently sought by Aetna as a woman candidate for their board, and she said, "I will not resign from the Anchor boards," and they said, "Well, that's quite all right, we would still like to have you."

Q What was the composition of the committee when it approved Miss Robichaud?

A Miss Robichaud came on the board in September of '73, and the make-up of the committee when she was recommended was Dr. Kemmerer, chairman, Mr. Hopkins, and myself.

Q If I have asked you this, I apologize, but I don't recall.

How long have you known Dr. Kemmerer?

A His directorship on the fund boards predates my coming with the company, and so I have known him since I have been with the Anchor group, namely, since 1959.

Q Did you work closely with both Dr. Burks and Dr. Kemmerer by reason of your common service on the board of directors of the Anchor funds?

A I wouldn't say closely. Our only contacts were at monthly directors' meetings, and so it was the relationship one has with members of a board.

Q How long did those board meetings last, the monthly meetings? How long did they last?

A Oh, they run two, two and a half hours.

Q And each time there was a meeting, would that be a meeting of all the boards of all the Anchor answered how long the meetings last and how frequently they occur. You are now asking him questions that go far beyond that and which have nothing to do with the issues.

MR. TERSIGNI: Let me rephrase the question.

Q Would there be one session once a month when the directors met as members of the boards of all seven funds, or were there multiple meetings during the month at which you might work with these people?

A One session, once a month.

Q How would they work, generally? Give me just a representative explanation of how they work.

MR. POLLACK: I object, and I will instruct the witness not to answer. You have got the information you wanted, which was how long and how frequently, and I think that beyond that the matter is not relevant.

Q Would the directors, or any of them, come to town, if they were from out of town, before the day of the meeting?

A Ordinarily they would arrive in Elizabeth in time for lunch, prior to the meeting, which commences

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at 1:30.

Q So you would all have lunch together and then have the meeting?

A That's correct.

Q Which would last two and a half hours or so?

A That's correct.

Q What about committee work?

A Usually in the morning, before lunch.

Q So all of the committee work and all of the board work was planned to take place on one day so that people wouldn't have to travel back and forth?

A That is correct.

Q Were there ever occasions where some of the directors from out of town might arrive the day before and stay, you know, beyond the date of the meeting?

A Some of them might have come and might regularly come to New York the night before.

Q Were there any directors that you had occasion to either work with or to see, on business or socially or otherwise, other than on that one day a month when the director meetings and committee meetings took place?

A No, that's the only time.

Q You are talking, of course, not of the affiliated directors?

A I'm talking primarily of the non-affiliated directors.

Q And specifically, that was the only day you would see Mrs. O'Connor, for example, or Mr. Laun?

A That's correct.

Q Or Miss Robichaud, or Mr. Stephens, or Mr. Kendall?

A That's correct.

MR. TERSIGNI: May I have this marked as Exhibit 9 for identification, please.

(Document entitled "Beryl Robichaud," marked as Plaintiffs' Exhibit 9 for identification, as of this date.)

MR. TERSIGNI: Exhibit 9 for identification is a document captioned "Beryl Robichaud," which was furnished to us in the same manner as Exhibits 7 and 8, and I call for supplementation of the information on that schedule, as I have in connection with 7 and 8.

Q When Miss Robichaud was being considered for membership on the board of directors by yourself, Mr. Hopkins and Dr. Kemmerer, did you consider her qualifications to be on the qualifications committee?

A At the time she was being considered to be on the board?

Q Yes.

A No.

Q When did she go on to the board, in September of '73?

A That's my recollection, yes.

Q Do you recall when in September of '73?

A Whatever date the stockholders' meeting was held.

Q And on September 26th she went right on to the qualifications committee; is that right?

A Yes. That was her first committee assignment, it looks like.

Q When was she considered for membership on the qualifications committee?

A Well, that was the organization meeting following the stockholders' meeting. As a new member of the board, she was entitled to some committee assignment, and with the other people who had left the board, and the changing of chairmanship of various committees, and committee assignments, that was an

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assignment which fell ~~on~~ TO her.

Q She had just that morning been elected to the board; is that right?

A That's right.

Q On the recommendation of your committee, consisting of you, Dr. Kemmerer and Mr. Hopkins, that she was qualified to be on the board?

A Right.

Q But the three of you never gave consideration as to whether she was qualified to be on the qualifications committee; right?

A I would say that anyone who was qualified to be a member of the board would be qualified to be a member of a board committee.

Q No matter how long a time or how short a time a person had been on the board?

A I would think that had we not given her any committee assignment, it would have looked somewhat insulting to her.

Q I agree. But my question is why this assignment, Mr. Haire. Who recommended her for this one?

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A All I can ~~do is~~ say is that if you have to choose between the contract committee, the audit committee, the brokerage committee, or this committee, you could make the same challenge to her position as a new director on any committee.

Q Do you feel that it was important for the unaffiliated directors to have a strong voice on this committee?

A Of course, on all committees. They are a majority.

Q And you felt that Miss Robichaud, who had just joined the board that morning, was going to provide that strong voice?

A I think she was every bit as capable of passing on the qualifications of prospects for nomination as any member of the board.

(Continued on next page.)

Q Do you think she was familiar with the fund and the kind of work that directors had to do, and the demands that were made on directors, and the decisions that directors had to make, and so on and so forth, that she could pass on the question of qualification?

MR. POLLACK: I object to the form of the question.

Q Do you think she was qualified to pass on all of that?

MR. POLLACK: I object to the form of the question.

Q Do you think she was qualified by experience or otherwise to know, independently, what a director of these funds was required to do and what he needed in the way of experience and background, and so forth, to do it?

A Since this is a committee which functions periodically, and since the probabilities were that not until the next annual meeting, if then, would there be a need to fill a vacancy, she was certainly as well qualified to learn in the interim what the role was, as she was to function on any of the other committees which were not periodic in nature.

Q Is it your testimony that she may not have had that backlog of knowledge and experience at the time, but that she could gather it over the next year or so?

A In the first place, her appointment to this committee was made by the board, not made by me.

Q You were on the board; weren't you?

A Of course.

Q Did you vote for her?

A I did.

Q Who recommended her for this slot?

A I don't recall.

Q Do you remember objecting on the grounds that she was not sufficiently experienced?

A Of course not. I already stated she was FULLY ~~sufficiently~~ qualified for this position. 9

Q I am asking you if it's your testimony that you thought she was qualified because she could pick up what she needed to know over the ensuing year?

A Her responsibility as a member of this committee was to evaluate prospective candidates for the board. I felt and still do that she was fully qualified for that position.

Q Do you feel that she was sufficiently

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independent of your judgment, as the chief executive officer of Anchor and the president of Fundamental, who had been with the fund for 15 or more years?

A Since I had never met her before, and she was nominated for the board, I can assure you that I felt that.

Q You felt she had sufficient experience of the Anchor funds, and what was required of directors, and so forth, so that she could exercise an independent judgment, completely apart from what your opinion might have been, as to the qualifications of a given individual?

MR. POLLACK: I object to the form of the question.

You may answer it.

Q Is that right?

A I believe she was fully qualified to determine what candidates might make a contribution as a director.

Q Completely independent of you?

A Of course.

Q Who was the first candidate on whose qualifications she passed?

A I think that the only candidate who has been considered by the committee on which she has served was Dr. Kendall.

Q Who?

A Leon Kendall.

Q Who passed on Mr. Stephens?

A The same committee that passed on Miss Robichaud.

Q That was Mr. Hopkins, Dr. Kemmerer, and yourself?

A That is correct.

Q Was there any consideration given to putting Mr. Stephens on the qualifications committee?

A He was placed on some other committee.

Q That's not my question, sir. My question is, was any consideration given to placing Mr. Stephens on the qualifications committee.

A I don't know. As I indicated to you earlier, the effort is made to allocate the vacancies among members of the board.

Q But Miss Robichaud was put on the qualifications committee, and Mr. Stephens was put on another committee?

A That is correct.

Q And they both became directors on the

same day; didn't they?

A That is correct.

Q And I assume that somebody focused in on the subject of to what committees should each of them be assigned; correct?

A I assume so.

Q It would seem a logical assumption; wouldn't it?

And my question to you, sir, is why was Mr. Stephens put on some other committee and Miss Robichaud on this committee?

A Well, I would like to suggest, as I testified earlier, that since the origins of the directors' qualification committee were complaints from the shareholders that we didn't have adequate woman representation on the board, it was a logical place to put a woman, on the directors' qualification committee, so that that objection could be handled.

Q Was that the reason?

A I can't testify it was the reason.

Q Who made the recommendation?

A As I said -- this is a fairly small board, and the apportionment of these committee assignments is handled at the meeting.

Q You were on this committee; right?

A Yes.

Q And so was Dr. Kemmerer, and Mr. Hopkins was about to leave; correct? Were you consulted as to what your recommendations were as to which of these individuals should go on the qualifications committee?

A ~~No, we're talking~~ Could you be more specific? 9
~~about --~~

Q Yes, we are talking about September 26, 1973, immediately prior to the election of Miss Robichaud and Mr. Stephens.

~~Q~~A Dr. Kemmerer was continuing on as chairman of that committee. I was continuing on as a member of that committee. There was one vacancy on the committee as a result of Mr. Hopkins' retirement. 9

Q Did anybody ask for the opinion of the committee members, Mr. Kemmerer, Mr. Hopkins and Mr. Haire --

A Well, Mr. Hopkins wasn't there at that point, so I'm sure THAT HIS OPINION WASN'T SOUGHT 9

Q Mr. Hopkins approved Miss Robichaud. He also approved Mr. Stephens.

A That's correct.

Q Then he was immediately, that afternoon, replaced by Miss Robichaud?

A No, his recommendation of them obviously preceded the preparation of proxy material several months ahead of time.

Q My question, Mr. Haire, is, were you, Dr. Kemmerer and Mr. Hopkins consulted with respect to whether Miss Robichaud should be assigned to the qualifications committee, and whether or not Mr. Stephens ought to be on that committee?

MR. POLLACK: Mr. Tersigni, Mr. Haire has stated not once, but now three or four times, that the board considered the candidates for assignment to the different committees. What more can he say on that subject?

MR. TERSIGNI: He said that, and I think what more he can do is to answer my question.

MR. POLLACK: I think he has answered your question.

MR. FRIEDMAN: I would like to object to the question on the grounds that you don't ask him was he consulted by any person. If you put in the person as to whom you would like to know whether he was consulted, I think

Q Were you specifically, and was Mr. Kemmerer, or was Mr. Hopkins, as the three members of the committee, immediately before the election of Robichaud and Stephens, were you or were the three of you or any number of you specifically asked what your recommendation to the board was with respect to who ought to replace Mr. Hopkins?

Do you understand that question?

A I think the answer would be no.

Q Was anybody asked for a recommendation on that subject?

A Well, there are a certain number of vacancies, and there are a certain number of people who are coming on the board, and it isn't as big an assignment as you seem to be making it to plug those people into the vacancies that exist.

Q My question is, was anybody consulted?

MR. POLLACK: I think the witness has answered that question now not four or five, but for a sixth time.

MR. TERSIGNI: I don't think he has.

MR. POLLACK: Do you have anything to add to your answer?

THE WITNESS: I have nothing to add.

Q At the time that Miss Robichaud and Mr. Stephens were elected in September of 1973, were there two vacancies anticipated in the board?

A Actually there were three directors who went off the board at that time. I have already mentioned Mr. Taylor. We have already discussed Mr. Hopkins. And Mr. Wade went off the board at that time.

Q So at the time these two people were nominated, there either had been or you anticipated three vacancies, but only two replacements would be nominated

A That's correct.

Q Is that correct?

A Yes.

Q Was that part of reducing the authorized number of the directors?

A We did reduce the number at the same time.

Q Was that the reason that you only nominated two to replace three, or was there some other reason?

A No, there wasn't any reason.

Q There was no reason?

A The board has been 10, it's been 11, it's been 9, at any given time, depending upon what candidates were recommended to complete a slate.

Q When the three people left that you mentioned, and Miss Robichaud and Mr. Stephens came on to the board, did that reduce the number of the directors from 11 to 10, as a matter of fact?

A I would guess that it did, yes.

Q Who suggested Mr. Stephens for nomination to the board?

A Mr. Hopkins.

Q Do you know whether Mr. Stephens was a close friend of Mr. Hopkins?

A He had known him in business, in the steel business, for a great many years. Whether they would characterize themselves as close friends or not, you'd have to ask them.

Q He never told you he was a close friend of his?

A No.

Q What did he tell you, Mr. Hopkins, about Mr. Stephens, if anything, prior to the time that you voted for him?

A He discussed his business background with Bethlehem Steel, with Jones & Laughlin, where Mr. Stephens had been chairman of the board and chief executive officer, indicated that in his, Mr. Hopkins', business dealings over the years, he had been very much impressed with Mr. Stephens' ability, and felt that he would make an excellent outside director.

Q Getting back to when the Lasker suit was commenced in February of '73, were you, as a director of the fund, interested or concerned with what, if anything, the fund ought to do with respect to that lawsuit?

MR. POLLACK: I object to the form of that question. I also object on the grounds that it's outside the discovery as ordered by Judger Werker. And I direct the witness not to answer.

Q Did there come a time when the directors instructed counsel for the fund to request a stay of the action?

MR. POLLACK: Same direction.

Q Did you discuss among the directors, or with anybody else, that the action should be stayed until the Goldman, Sachs case was disposed of, and then the board should have an opportunity to exercise its business judgment --

MR. POLLACK: Same direction.

funds with which Mr. Haire and other defendants are connected, and so forth.

We think all of these facts go to the question of independence. And I am sorry you saw fit to make the rather unfortunate remark that you did. I think it displays a lack of understanding of what I think the issue is.

Would the reporter mark this as 10 for identification.

(Document entitled "William J. Stephens," marked Plaintiffs' Exhibit 10 for identification, as of this date.)

MR. POLLACK: May I suggest, Mr. Tersigni, to save time, that the answers to 10 would be the same as to 6, 7, 8 and 9?

MR. TERSIGNI: Yes, and the requests for supplementation on my part.

Exhibit 10 for identification is a schedule captioned "William J. Stephens," and is similar in nature to 7, 8 and 9, and we stipulated that the witness' responses to this would be the same as to others, and my request for supplementation is also the same.

MR. POLLACK: Perhaps you might mark the next one, 11, on the same basis.

MR. TERSIGNI: We are going to mark the next one, relating to Kendall, with the same understanding.

(Document entitled "Leon T Kendall," marked Plaintiffs' Exhibit 11 for identification, as of this date.)

(At this time, a brief recess was taken.)

(Continued on page 213.)